APPENDIX A — OPINION AND REMITTITUR OF THE STATE OF NEW YORK COURT OF APPEALS DECIDED JUNE 12, 2003

STATE OF NEW YORK
COURT OF APPEALS

3 No. 42

(Action No. 1)

Saratoga County Chamber of Commerce Inc., et al.,

Respondents,

v.

George Pataki, as Governor of the State of New York, et al.,

Appellants.

(Action No. 2)

Keith L. Wright, & c., et al.,

Respondents,

v.

George Pataki, as Governor of the State of New York, et al.,

Appellants.

Appendix A

ROSENBLATT, J.:

On this appeal we address the authority of the Governor to enter into agreements with Indian Tribes to permit casino gaming on Indian reservations. Plaintiffs are legislators, organizations and individuals opposed to casino gambling. In challenging the Governor's authority, they contend that by negotiating and signing the agreements without legislative authorization or approval, Governor Mario M. Cuomo in 1993 and Governor George E. Pataki in 1999 violated the principle of separation of powers under the State Constitution (*see* N.Y. Const art III, § 1; art IV, § 1).[1] In response, the Governor and the other defendants (collectively, the State) argue that plaintiffs may not bring this action for a variety of procedural reasons and that in any event the agreements were consistent with the separation of powers. After setting forth the background of the case, we address the procedural issues and then turn to the merits.

I. Factual and Statutory Background

On October 15, 1993, then-Governor Cuomo entered into the "Tribal-State Compact Between the St. Regis Mohawk Tribe and the State of New York." The compact, which underlies this appeal, is the outgrowth of the Federal Indian Gaming Regulatory Act (IGRA) (25 USC §§ 2701-2721; 18 USC §§ 1166-1168), and allows the Tribe to conduct gambling, including games such as baccarat, blackjack,

1. Plaintiffs additionally argue that allowing Las Vegas-style gaming violates the State constitutional prohibition against gambling (*see* N.Y. Const art I, § 9). For reasons that follow, we need not address that argument at this time.

craps and roulette, on the Akwesasne Reservation in Franklin County.

Congress passed IGRA in response to the United States Supreme Court's decision in *California v. Cabazon Band of Mission Indians* (480 US 202 [1987]), which held that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity" (25 USC § 2701[5]). IGRA provides statutory authorization for the establishment of Indian casinos, attempts to regulate the gaming so as to avoid "corrupting influences" and seeks to ensure that the Indian Tribes are the primary beneficiaries of the gaming (*see* 25 USC § 2702).

IGRA requires a compact between a Tribe and the State before the Tribe will be permitted to conduct "Class III" gambling, which includes the Las Vegas-style gaming at issue here.[2] When a Tribe requests that a compact be negotiated, a State is required to do so in good faith (*see* 25 USC § 2710[d][3][A]). The compact should resolve such matters

2. IGRA creates three classes of wagering games. Class I games are those "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations" (25 USC § 2703[6]). Class II gaming includes bingo and card games (excluding banking card games) that are operated in accordance with state law limits on the amount of wagers and hours of operation (*see* 25 USC § 2703[7]). Class III gaming includes all other forms of gambling (*see* 25 USC § 2703[8]).

as the applicability of State laws at the casinos, State taxation of gambling revenues, remedies for breach of contract and "any other subjects that are directly related to the operation of gaming activities" (25 USC § 2710[d][3][C][i]-[vi]). IGRA authorizes compacts only in "State[s] that permit[ ] such gaming for any purpose by any person, organization, or entity" (25 USC § 2710[d][1][B]).

According to the terms of the 1993 compact, the New York State Racing and Wagering Board, the New York State Police and the St. Regis Mohawk Tribal Gaming Commission were vested with gaming oversight. Law enforcement responsibilities fell under the cognizance of the State Police, with some law enforcement matters left to the Tribe. As required by IGRA, the compact was approved by the United States Department of the Interior before it took effect.

The Tribe opened its casino on April 10, 1999. On May 27, 1999, Governor Pataki[3] and the Tribe executed an amendment to the 1993 compact. The Interior Department approved the amendment, which allowed the casino to operate *electronic* class III games, including keno. By its terms, the amendment expired on May 27, 2000, one year after it was signed. Although the Governor and the Tribe later agreed to two additional amendments, the Interior Department disapproved them. As a result, there is no authorization in effect allowing the Tribe to operate electronic gaming. Nevertheless, the parties inform us that electronic gaming continues at the casino.

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3. Deputy Counsel Judith Hard signed the amendment on behalf of the Governor.

Appendix A

Shortly after the 1999 amendment took effect, plaintiffs brought suit alleging that the 1993 compact and the 1999 amendment violated the separation of powers and the constitutional gambling prohibition. They sought a declaration that the 1993 compact and the 1999 amendment were unconstitutional, and an injunction prohibiting the State from expending any money in furtherance of the agreements. They also asked the court to enjoin the Governor from taking any further unilateral action (such as signing a successor to the 1999 amendment) that would extend gambling in the State.

By judgment dated March 10, 2000, Supreme Court dismissed the action for plaintiffs' failure to join the Tribe as an indispensable party (*see generally* CPLR 1001). On appeal, the Appellate Division reversed, concluding that the Tribe was not an indispensable party. The Court noted that a contrary ruling would put Indian gaming compacts beyond constitutional challenge or review (*see Saratoga County Chamber of Commerce v. Pataki*, 275 A.D.2d 145, 151-154 [2000] ["*Saratoga I*"]). While the Appellate Division acknowledged that the Tribe's interests would be affected by the suit, it determined that, on balance, the Tribe's absence should not prevent the suit from going forward. The Court also rejected the State's statute of limitations, standing and laches defenses (*see id.* at 154-158).

On remand, by order dated April 12, 2001, Supreme Court granted plaintiffs summary judgment. The court declared the 1999 amendment and the 1993 compact void and unenforceable, and enjoined the Governor from taking any further action to reenact an electronic gaming amendment

without legislative approval. The Appellate Division affirmed, holding that the Governor's unilateral action deprived the Legislature of its policymaking authority in such areas as "the location of the casino, the gaming that could be carried on there, the extent of State involvement in providing regulation * * * and the fees to be exacted for that regulation" (*Saratoga County Chamber of Commerce, Inc. v. Pataki*, 293 A.D.2d 20, 26 [2002] ["*Saratoga II*"]). The State appealed as of right, bringing up for review the substantial constitutional question presented.

II. Mootness

The jurisdiction of this Court extends only to live controversies (*see Matter of Grand Jury Subpoenas for Locals 17, 135, 257 & 608*, 72 N.Y.2d 307, 311 [1988]; *Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 713-714 [1980]). We are thus prohibited from giving advisory opinions or ruling on "academic, hypothetical, moot, or otherwise abstract questions" (*Hearst Corp.*, 50 N.Y.2d at 713-714). Accordingly, where changed circumstances prevent us "from rendering a decision which would effectually determine an actual controversy between the parties involved," we will dismiss the appeal or reverse the lower court order and direct that court to dismiss the action (Karger, The Powers of the New York Court of Appeals § 71[a], at 426 [3d ed]).

A. 1999 Amendment

Plaintiffs' challenges to the 1999 amendment are moot. The amendment expired in May 2000, and in the intervening three years no similar agreement has gone into effect.

A declaration as to the validity or invalidity of the 1999 amendment would therefore have no practical effect on the parties. Granted, a declaration as to the Governor's ability to negotiate amendments to the compact would provide beneficial advice to future officials who will have to make decisions about this casino and other similar projects. This is true, however, of all requests for advisory opinions.

In *Hearst* we recognized that the mootness prohibition is subject to an exception, by which we have discretion to review a case if the controversy or issue involved is likely to recur, typically evades review, and raises a substantial and novel question (*see* 50 N.Y.2d at 714-715; *see also Wisholek v. Douglas*, 97 N.Y.2d 740, 742 [2002]). In that event, a court may reach the moot issue even though its decision provides no practical effect for the parties (*see Hearst*, 50 N.Y.2d at 714-715). Plaintiffs here ask us to apply the *Hearst* mootness exception and reach the validity of the 1999 amendment, arguing that the Governor's two unsuccessful attempts to extend the amendment demonstrate a high likelihood of recurrence. They further contend that the one-year length of both the 1999 amendment and the two proposed amendments makes judicial review impracticable.

These are cogent assertions but we are unpersuaded that this controversy is so likely to evade review as to justify our departure from the standard rules of mootness. We are confident that lower courts, if asked by the parties, will expedite consideration of any future agreement, so as to maximize the chances that a judicial resolution will be available during the operation of the agreement. More importantly, however, in light of our determination with

respect to the 1993 compact (Point VII below), there is no reason to believe that the Executive Branch will execute future agreements unilaterally, and therefore the precise issues presented by plaintiffs' challenge to the 1999 amendment may never again recur. Accordingly, we decline to reach that portion of plaintiffs' suit that challenges the validity of the 1999 amendment, and we vacate that portion of the Appellate Division order that declared the 1999 amendment void and unenforceable.

B. 1993 Compact

Plaintiffs' challenge to the 1993 compact undisputedly presents a live controversy. Without a valid Tribal-State compact, IGRA does not permit the operation of a casino.[4] Therefore, a declaration that the 1993 compact violates the State Constitution speaks to the legality of the casino's operation, and thus affects the rights of each party to this suit. Where, as here, a judicial determination carries immediate, practical consequences for the parties, the controversy is not moot (*see Johnson v. Pataki*, 91 N.Y.2d 214, 222 [1997]).

We now proceed to address plaintiffs' standing.

III. Standing

Standing to sue is critical to the proper functioning of the judicial system. It is a threshold question. If standing is

4. *See* 25 USC § 2710[d][1][C] [authorizing casino gambling on reservations where there is a Tribal-State compact "that is in effect"]; *Seminole Tribe v. Florida*, 517 U.S. 44, 47 [1996]).

denied, the pathway to the courthouse is blocked. The plaintiff who has standing, however, may cross the threshold and seek judicial redress. It is difficult to draw an exquisitely sharp line separating the worthy litigant from one who would generate a lawsuit to advance someone else's cause. The rules governing standing help courts to separate the tangible from the abstract or speculative injury, and the genuinely aggrieved from the judicial dilettante or amorphous claimant.

For generations, New York courts have treated standing as a common law concept,[5] requiring that the litigant have something truly at stake in a genuine controversy.[6] We have addressed the issue in a number of contexts, including standing for organizations and associations (*see Matter of Aeneas McDonald Police Benevolent Assn.*, 92 N.Y.2d 326 [1998]; *Society of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761 [1991]), legislators (*see Silver v. Pataki*, 96 N.Y.2d 532 [2001]), voters (*see Schulz v. New York State Executive*, 92 N.Y.2d 1 [1998]) and in challenges to administrative actions (*see Colella v. Bd. of Assessors*, 95 N.Y.2d 401 [2000]; *Rudder v. Pataki*, 93 N.Y.2d 273 [1999]; *Matter of New York Assn. of Convenience Stores*

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5. *See e.g. Society of Plastics* (77 N.Y.2d at 772 [citing *Schieffelin v. Komfort*, 212 N.Y. 520, 530 (1914); *Doolittle v. Supervisors of Broome County*, 18 N.Y. 155 (1858)]); *see also Wein v. Comptroller* (46 N.Y.2d 394 [1979]); *Wein v. Carey* (41 N.Y.2d 498 [1977]).

6. In contrast to our approach, standing in Federal courts rests on both constitutional (*see* U.S. Const art III, § 2, cl 1) and prudential grounds. For a comprehensive treatment of standing in Federal courts, see Erwin Chemerinsky, Federal Jurisdiction 56-114 (3d ed 1991).

v. Urbach, 92 N.Y.2d 204 [1998]; *Gernatt Asphalt Prods. v. Town of Sardinia*, 87 N.Y.2d 668 [1996]).

A number of organizations, legislators and citizen taxpayers are plaintiffs in this action and the State has contested standing as to all of them. Because we conclude that the citizen-taxpayers have standing, it is not necessary to address the State's challenge as to the other plaintiffs (*see County of Rensselaer v. Regan*, 80 N.Y.2d 988, 991 n [1992]).

Unlike other plaintiffs, citizen-taxpayers need not demonstrate an injury-in-fact to acquire standing. Instead, pursuant to State Finance Law § 123-b, a citizen-taxpayer may bring suit to prevent the unlawful expenditure of state funds "whether or not such person is or may be affected or specially aggrieved" by the challenged action. We have noted that while the statute might be read to allow actions when little or no injury has been claimed, courts have been inhospitable to plaintiffs who seek essentially to challenge non-fiscal activities by invoking the convenient statutory hook of § 123-b (*see Transactive Corp. v. N.Y. State Dept of Social Servs.* (92 N.Y.2d 579, 589 [1998]). Accordingly, we have held that a plaintiff's claims must have a "sufficient nexus to fiscal activities of the State" in order to confer standing (*Rudder v. Pataki*, 93 N.Y.2d at 281). A contrary rule would disrupt government operation by posing the threat of litigation to challenge any governmental action.

The task, of course, is to distinguish between cases that present a challenge to the expenditure of money and those that use the expenditure of money as a pretense to challenge

a governmental decision. As we have said, "it is one thing to have standing to correct clear illegality of official action and quite another to have standing in order to interpose litigating plaintiffs and the courts into the management and operation of public enterprises" (*Matter of Abrams v. New York City Tr. Auth.*, 39 N.Y.2d 990, 992 [1976]). Accordingly, a claim that State funds are not being spent wisely is patently insufficient to satisfy the minimum threshold for standing, but a claim that it is illegal to spend money *at all* for the questioned activity likely would provide the plaintiff with standing. Here, the citizen-taxpayers have sufficiently alleged a challenge to the expenditure of State money to withstand the State's motion to dismiss for lack of standing.

Another reason informs our conclusion. Were we to agree with the State and deny standing as to all plaintiffs in this action, an important constitutional issue would be effectively insulated from judicial review, something we cautioned against in *Boryszewski v. Brydges* (37 N.Y.2d 361, 364 [1975]). Plaintiffs allege that the Governor has acted ultra vires, exceeding the grant of authority that the Constitution gives to the Executive Branch. In separation of powers disputes of this kind, there will ordinarily be few who can claim concrete injury resulting from a breach of the constitutional division of authority. As a party to the 1993 compact but not to this suit, the Tribe signed the agreement and twice sought to extend most terms of the 1999 amendment. The Tribe is therefore an unlikely plaintiff. Others who could be considered harmed by casino gambling may be too remotely affected to gain relief in the courts.

The case before us contrasts sharply with *Matter of Colella v. Bd. of Assessors* (95 N.Y.2d 401, 410-411 [2000]), where we denied standing, holding that granting it would "permit challenges to the determinations of local governmental officials having no appreciable public significance beyond the immediately affected parties." The issues in the present dispute are fundamental and of immense public significance.

It follows that our doctrines governing standing must be sensitive to claims of institutional harm. Actions of this type can serve as a means for citizens to ensure the continued vitality of the constraints on power that lie at the heart of our constitutional scheme (*cf. Dairylea Corp. v. Walkley*, 38 N.Y.2d 6, 10 [1975]; *Committee for an Effective Judiciary v. State*, 679 P.2d 1223, 1227 [Mont 1984]; *State ex rel. Howard v. Oklahoma Corporation Commission*, 614 P.2d 45, 52 [Okla 1980]). Thus, where a denial of standing would pose "in effect * * * an impenetrable barrier to any judicial scrutiny of legislative action," our duty is to open rather than close the door to the courthouse (*see Boryszewski*, 37 N.Y.2d at 364; *see also State ex rel. Clark v. Johnson*, 904 P.2d 11 [NM 1995]; *Rios v. Symington*, 833 P.2d 20 [Ariz 1992]; *State ex rel. Sego v. Kirkpatrick*, 524 P.2d 975, 979 [NM 1974]).

Here, the citizen-taxpayer plaintiffs argue that the expenditure of State funds and the use of State regulatory personnel for the casino violate the New York Constitution. If standing doctrine precludes them from bringing this suit, the casino will remain operating indefinitely whether or not the 1993 compact was constitutional. Standing is properly

satisfied here, lest procedural hurdles forever foreclose adjudication of the underlying constitutional issue. We next address the statute of limitations argument.

IV. Statute of Limitations

The State claims that this suit should have been brought as an article 78 proceeding, and that as such, the four-month statute of limitations must be applied and the suit dismissed as time-barred (*see e.g.* CPLR 217; *Solnick v. Whalen*, 49 N.Y.2d 224, 229-230 [1980]). We disagree because article 78 does not provide plaintiffs a way of obtaining the relief they seek. Where "no other form of proceeding exists for the resolution of the claims tendered in the declaratory judgment action, the six-year limitation of CPLR 213 (subd 1) will then be applicable" (*Solnick*, 49 N.Y.2d at 230).

Plaintiffs seek a declaration as to the unconstitutionality of the 1993 compact and an injunction against the use of State funds to implement it. That relief cannot be afforded under CPLR article 78. The closest remedy contained in article 78 is prohibition, where an official is proceeding "without or in excess of jurisdiction" (CPLR 7803[2]). We have held, however, that article 78 may not be used against executive officials, and plaintiffs would therefore have been unable to use article 78 to prevent the Governor from signing the compact (*see Matter of Morgenthau v. Erlbaum*, 59 N.Y.2d 143, 147 [1983]; *Matter of Dondi v. Jones*, 40 N.Y.2d 8, 13 [1976]; *see also Sears v. Hull*, 961 P.2d 1013, 1016-1017 [Ariz 1998]). Accordingly, the article 78 statute of limitations does not apply. That being so, plaintiffs' declaratory judgment action falls within

the residuary six-year statute of limitations period under CPLR 213(1) (*see Vigilant Ins. Co. v. Housing Auth.*, 87 N.Y.2d 36, 42 [1995]; *see also Solnick*, 49 N.Y.2d at 230; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3001:18, at 446).

The 1993 compact was signed on October 15, 1993, and published in the Federal Register on December 13, 1993. IGRA provides that a compact is not "final" until published in the Federal Register (25 USC § 2710[d][1][A][iii]). Plaintiffs filed suit on September 23 and 24, 1999. The actions were therefore commenced within the limitations period. A suit brought in compliance with the statute of limitations may nonetheless be barred by laches, so we proceed to address that issue.

V. Laches

Laches and limitations are not the same. Limitations involve the fixed statutory periods within which actions must be brought, while laches signifies a delay independent of statute (*see* Siegel, N.Y. Prac § 36, at 44 [3d ed 1999]; 2A Carmody-Wait § 13:4, at 94 [2d ed 2001]). The Court has defined laches as an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party (*see Matter of Barabash*, 31 N.Y.2d 76, 81 [1972]; *see also Dreikausen v. Zoning Bd. of Appeals*, 98 N.Y.2d 165, 173 n 4 [2002]). The mere lapse of time, without a showing of prejudice, will not sustain a defense of laches (*see Galyn v. Schwartz*, 56 N.Y.2d 969, 972 [1982]; *Sorrentino v. Mierzwa*, 25 N.Y.2d 59 [1969]; *Skrodelis v. Norbergs*, 272 A.D.2d 272 [2d Dept 2000]).

The defense has been applied in equitable actions and declaratory judgment actions (both of which are governed by the six-year catch-all provision of CPLR 213[1]) where the defendant shows prejudicial delay even though the limitations period was met.[7]

The State claims that the nearly six-year delay between the effective date of the 1993 compact and the start of this suit has prejudiced the Tribe. The Appellate Division refused to consider the effect of any prejudice to the Tribe, concluding that the State lacked the authority to raise a claim of prejudice on behalf of a non-party. We conclude that the State has the power to argue that prejudice to a non-party bars this action, but that in this instance there has been no prejudice to the Tribe warranting dismissal.

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7. *See Krieger v. Krieger* (25 N.Y.2d 364 [1969]); *Calhoun v. Millard*, 121 N.Y. 69 [1890]; *Guibord v. Guibord* (2 A.D.2d 34, 36 [1st Dept 1956]); Weinstein-Korn-Miller, *supra*, § 3001.19, at 30-152 to 30-153; Siegel, N.Y. Prac § 36, at 45 [3d ed 1999] [citing *Feldman v. Metropolitan Life Ins. Co.*, 259 App. Div. 123 (1st Dept 1940)]; *id.* § 438, at 711; 24C Carmody-Wait § 147:129, at 140 (2d ed 2001); Eager, The Declaratory Judgment Action § 9, at 41-44 (1971); Annotation, *What Constitutes Laches Barring Right to Relief in Taxpayers' Action*, 71 ALR2d 529 [1960]; Annotation, *Statute of Limitations or Doctrine of Laches in Relation to Declaratory Actions* (151 ALR 1076 [1944]); *see also Town of Cortlandt v. Village of Peekskill* (281 N.Y. 490, 498 [1939] [denying a laches defense to a challenge of a village charter, citing intervening legislative action as excusing the delay in bringing suit]; *Am. Dock Co. v. City of New York*, 174 Misc. 813 [1940], *affd* 261 App.Div. 1063 [1st Dept 1941], *affd* 286 N.Y. 658 [1941]).

Appendix A

In *Schulz v. State of New York* (81 N.Y.2d 336, 348-350 [1993]), we held that the prejudice caused by sales of bonds between the effective date of a law authorizing those bonds and the institution of the challenge to the law (one year later) was sufficient prejudice to bar the action. The Court held that the impact on the State as well as on the investors, "with whom the State engaged in these multimillion dollar financing transactions," was enough to spell out laches. We thus recognized that harm to economic interests can be enough to bar an action on laches grounds, even if the delay does not affect a defendant's ability to defend against a suit.

Nowhere in the present case, however, is there any indication that the delay in bringing this action has caused the slightest harm to the Tribe. Plaintiffs point out that the Tribe has been operating the casino — and presumably profiting from it — during the entire pendency of this suit (*cf. Marcus v. Village of Mamaroneck*, 283 N.Y. 325, 332 [1940] [noting in a zoning dispute that "the delay of plaintiffs has afforded defendants many years of unlawful use"]). While in *Schulz* the delay could have caused bond investors to lose the opportunity for investments were the bonds to be invalidated, here there is no comparable risk. True enough, had the casino been shut down on its grand opening, the investment would have been lost. But the casino has been operating for four years, and there is nothing on this record to indicate how much money the casino has made during the pendency of this action. Without knowing how much, if anything, the casino stands to lose — and having no basis to conclude that it has not profited — we cannot dismiss a suit on laches' grounds for economic prejudice.

Appendix A

Plaintiffs argue that the Tribe was on notice as to the possible illegality of the compact, citing a memorandum from Governor Cuomo's counsel indicating that the Tribe had been informed that legislative approval would be required before the State could enter into effective compacts.[8] Thus, while

8. In pertinent part, the memorandum reads as follows:

> "The compacts assign largely to one existing State agency — the Racing and Wagering Board — the State's 'regulatory and oversight' power. The Board would (1) have access to all gaming facilities and business and accounting records; (2) receive daily inspection reports and patron complaints; (3) certify the Nation's gaming employees; (4) register all enterprises that will provide gaming services, supplies and equipment to the Nation; (5) meet four times a year with the Nation to discuss the regulatory enforcement program; and (6) decide whether to allow new games or activities not included [*sic*] a compact. In order to carry out its new duties, the Board must adopt new rules and regulations.
>
> "Only the legislature, however, can direct the Board to undertake the new Indian gaming regulatory duties required by the compacts. *Equine Practitioners Ass'n, Inc. v. New York State Racing and Wagering Board*, 105 A.D.2d 215, 219 (1984), *aff'd as modified on other grounds*, 66 N.Y.2d 786 (1985) ("an administrative agency, as a creature of the legislature, is clothed with those powers expressly conferred by its authorizing statute, as well as those required by necessary implication.") And, only the legislature can empower the Board to adopt the new rules and regulations that will be required in order for the Board to supervise Indian

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gaming. *See, Beer Garden, Inc. v. New York State Liquor Authority*, 79 N.Y.2d 266, 276 (1992) (a State agency's rule-making authority must be granted to it by the Legislature).

"Nothing in existing law confers on the Board — expressly or by necessary implication — the authority to supervise Indian gaming, including the authority to adopt new rules and regulations to be required.

* * *

"We have long recognized the need for legislative action to implement the compacts. The Governor has consistently taken the position that the legislature would have to authorize the State to implement compacts that require the State to regulate and oversee Indian gaming. That is why the Governor submitted a program bill in 1990 and 1991, seeking authority from the legislature to negotiate and enter into compacts with any Indian tribe or nation. And, that is why, from the outset of negotiations with the St. Regis-Mohawk Tribe in 1990, and with the Nation last summer, the State's negotiators told their Indian counterparts that *legislative approval would be required before the State could enter into effective compacts.*

* * *

"The State cannot fulfill its regulatory responsibilities under the compacts without clear legislative authorization for the State agencies that must implement them. Absent such authorization, there is a substantial likelihood that the State's regulatory authority would be challenged * * * *" (emphasis added).

the casino is presumably expected to make large sums over the next several years, and while plaintiffs' suit threatens that source of revenue, the prejudice caused by a loss of expected profits based on a predictably vulnerable compact is not the sort of prejudice that supports a defense of laches. Were it otherwise, very few suits would proceed past laches analysis, and certainly no suits seeking to invalidate illegal contracts would be allowed to proceed.

There is another important distinction between *Schulz* and this case. In *Schulz*, the State approved a bond program to raise revenue. Investors bought bonds expecting the State to pay back the investment with interest. To maintain fiscal credibility as a borrower, the State must uphold its contracts, particularly when it has borrowed funds on credit. We recognized that entertaining a suit challenging the authority of the State to issue those bonds — particularly after a year's delay — might hinder the State's ability to raise financing in the future, to say nothing of the effects on budget projections that invalidation of a source of revenue would cause (*see Schulz*, 81 N.Y.2d at 347-348 [noting "the profound destabilizing and prejudicial effects from delay * * * (that) must be examined for their impact on the State, on the operation and maintenance of orderly government, on those with whom the State engaged in these multimillion dollar financing transactions, and on society in general"]). None of those factors is present here.

VI. The Tribe as an Indispensable Party

The Tribe is not a party to this action. Although its interests are certainly affected by this litigation, the Tribe

has chosen not to participate. Unless Congress provides otherwise, Indian Tribes possess sovereign immunity against the judicial processes of States (*see e.g. Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 [1978]; *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 [1940]; *Turner v. United States*, 248 U.S. 354, 358 [1919]). As a result, New York courts cannot force the Tribe to participate in this lawsuit. The State claims that the Tribe's absence requires us to dismiss this action. We disagree.

CPLR 1001 sets forth the rules governing when joinder of parties is necessary to continue an action affecting the rights of those parties. The statute directs that persons must be brought into the action when joinder is necessary to accord "complete relief" between the parties, or when the interests of the person might be "inequitably affected by a judgment in the action" (CPLR 1001[a]). Where a person who should be joined nevertheless cannot be joined, courts must decide whether the action can proceed without the "necessary" party. Parties who must be joined lest the action be dismissed are termed "indispensable parties." CPLR 1001(b) provides five factors for courts to consider in deciding whether to dismiss an action where, as here, "jurisdiction over [the necessary party] can be obtained only by his consent or appearance."

> "1. whether the plaintiff has another effective remedy in case the action is dismissed on account of the nonjoinder;
>
> "2. the prejudice which may accrue from the nonjoinder to the defendant or to the person not joined;

"3. whether and by whom prejudice might have been avoided or may in the future be avoided;

"4. the feasibility of a protective provision by order of the court or in the judgment; and

"5. whether an effective judgment may be rendered in the absence of the person who is not joined" (CPLR 1001[b]).

The State relies principally on subsection 2, and argues that the prejudice to the Tribe caused by a judgment eviscerating the authority under which they operate the casino should be sufficient to dismiss the action. In contrast, plaintiffs rely on subsection 1, arguing that there can be no remedy for the alleged constitutional violation if the Tribe's absence requires dismissal.

Plaintiffs' arguments are on firmer ground. Not only will these plaintiffs be stripped of a remedy if we hold that the Tribe is an indispensable party, but no member of the public will ever be able to bring this constitutional challenge. In effect, the Executive could sign agreements with any entity beyond the jurisdiction of the Court, free of constitutional interdiction. The Executive's actions would thus be insulated from review, a prospect antithetical to our system of checks and balances.

There are two principal purposes of requiring dismissal owing to the absence of an indispensable party. First, mandatory joinder prevents multiple, inconsistent judgments relating to the same controversy. Second, joinder protects

the otherwise absent party who would be "embarrassed by judgments purporting to bind their rights or interests where they have had no opportunity to be heard" (*First Nat'l Bank v. Shuler*, 153 N.Y. 163, 170 [1897]; *see generally*, Weinstein-Korn-Miller, New York Civil Practice § 1001.01 [2002]).

Neither purpose applies here. The Tribe has chosen to be absent. Nobody has denied it the "opportunity to be heard"; in fact, the Oneida Indian Nation, which operates the Turning Stone Casino, has appeared as amicus curiae making much the same arguments we would expect to be made by the Tribe had it chosen to participate. While sovereign immunity prevents the Tribe from being forced to participate in New York court proceedings, it does not require everyone else to forego the resolution of all disputes that could affect the Tribe (*see Keene v. Chambers*, 271 N.Y. 326, 330 [1936]; *Plaut v. HGH Partnership*, 59 A.D.2d 686 [1st Dept 1977]; Weinstein-Korn-Miller, N.Y. Civil Practice § 1001.10 [citing cases]). While we fully respect the sovereign prerogatives of the Indian Tribes, we will not permit the Tribe's voluntary absence to deprive these plaintiffs (and in turn any member of the public) of their day in court.

The CPLR 1001 factors are meant to be balanced as appropriate under each case's unique circumstances. The Appellate Division concluded that the equities weighed against dismissal, and that conclusion was not an abuse of discretion. While in other cases sovereign immunity might support dismissal,[9] here the factors weigh toward allowing

9. We recognize that other courts have held that dismissal is proper when an affected Tribe declines to waive sovereign immunity

(Cont'd)

judicial review of this constitutional question (*see generally* Siegel, N.Y. Prac § 133 ["Dismissal of the action for nonjoinder of a given person is a possibility under the CPLR, but it is only a last resort"] [footnote omitted]).[10]

We conclude that the alleged constitutional violation will be without remedy if this action is dismissed for the Tribe's nonjoinder. We further conclude that to the extent the Tribe is prejudiced by our adjudication of issues that affect its rights under the compact, the Tribe could have mitigated that prejudice by participating in the suit (*cf. United States ex rel. Steele v. Turn Key Gaming, Inc.*, 135 F3d 1249, 1252 [8th Cir 1998]). The Tribe's nonjoinder is therefore excused, and we proceed to discuss the merits.

(Cont'd)

(*see e.g. Am. Greyhound Racing, Inc. v. Hull*, 305 F3d 1015, 1025 [9th Cir 2002]; *Dawavendewa v. Salt River Project*, 276 F3d 1150, 1162 [9th Cir 2002]; *Manybeads v. United States*, 209 F3d 1164, 1166 [9th Cir 2000]; *Enterprise Mgmt. Consultants, Inc. v. United States ex rel. Hodel*, 883 F.2d 890, 894 [10th Cir 1989]). Our review of the CPLR 1001 factors, informed by New York's policy disfavoring dismissal, convinces us that we should not follow those cases.

10. For cases holding that an Indian Tribe's absence due to sovereign immunity should not result in dismissal, see e.g. *Kansas v. United States* (249 F3d 1213 [10th Cir 2001]); *Sac and Fox Nation v. Norton* (240 F3d 1250 [10th Cir 2001]); *Artichoke Joe's v. Norton* (216 F Supp 2d 1084, 1090-1091 [CD Cal 2002]); *Dairyland Greyhound Park, Inc. v. McCallum* (655 NW2d 474, 487 [Wis Ct App 2002]).

Appendix A

VII. Separation of Powers

Article III of the State Constitution vests the Senate and the Assembly with the legislative power of the State, while article IV vests the executive power in the Governor and article VI vests the court system with the judicial power (*see* N.Y. Const art III, § 1; art IV, § 1; art VI, § 1). We have recognized that these "separate grants of power to each of the coordinate branches of government" imply that each branch is to exercise power within a given sphere of authority (*Clark v. Cuomo*, 66 N.Y.2d 185, 189 [1985]). Stated succinctly, the separation of powers "requires that the Legislature make the critical policy decisions, while the executive branch's responsibility is to implement those policies" (*Bourquin v. Cuomo*, 85 N.Y.2d 781, 784 [1995] [citing *Matter of New York State Health Facilities Assn. v. Axelrod*, 77 N.Y.2d 340, 349 (1991)]).

This is not to say that the functions of government can be neatly boxed into judicial, executive and legislative categories. The distinctions are often elusive, and the fluid functioning of government requires that the interactions among the three branches be allowed some "play in the joints" (*Bain Peanut Co. v. Pinson*, 282 US 499, 501 [1931]; *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 US 579, 635 [1952] [Jackson, J., concurring]; *Matter of Richardson*, 247 N.Y. 401, 410 [1928]).

It thus falls to the courts, and ultimately to this Court, to determine whether a challenged gubernatorial action is "legislative" and therefore ultra vires. In this case we have no difficulty determining that the Governor's actions were policymaking, and thus legislative in character.

Initially, we hold that IGRA does not preempt State law governing which State actors are competent to negotiate and agree to gaming compacts. IGRA imposes on "the State" an obligation to negotiate in good faith (25 USC § 2710[d][3] [a]), but identifies no particular State actor who shall negotiate the compacts; that question is left up to State law (*see Pueblo of Santa Ana v. Kelly*, 104 F3d 1546, 1557 [10th Cir 1997], *cert. denied* 522 US 807 [1997]). As the Supreme Court noted, the duty to negotiate imposed by IGRA "is not of the sort likely to be performed by an individual state executive officer or even a group of officers" (*Seminole Tribe v. Florida*, 517 US 44, 75 n 17 [1996] [citing *State ex rel. Stephan v. Finney*, 836 P.2d 1169 (Kan 1992)]).

IGRA itself contemplates that States will confront several policy choices when negotiating gaming compacts (*see Yavapai-Prescott Indian Tribe v. Arizona*, 796 F Supp 1292, 1296-1297 [D Ariz 1992]). Congress provided that potential conflicts may be resolved in the compact itself, explicitly noting the many policies affected by tribal gaming compacts. Indeed, gaming compacts are laden with policy choices, as Congress well recognized.

> "Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to —
>
> "(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

"(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

"(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

"(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

"(v) remedies for breach of contract;

"(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

"(vii) any other subjects that are directly related to the operation of gaming activities" (25 USC § 2710[d][3][C]).

Compacts addressing these issues necessarily make fundamental policy choices that epitomize "legislative power." Decisions involving licensing, taxation and criminal and civil jurisdiction require a balancing of differing interests, a task the multi-member, representative Legislature is entrusted to perform under our constitutional structure.

Additionally, as noted by Governor's counsel in 1993, the compacts require the State Racing and Wagering Board

to adopt new regulations for carrying out its casino oversight responsibilities. The choice of *which* agency shall regulate an activity can be as fundamental a policy decision as choosing the substance of those regulations. For that reason, and because agencies are creatures of the Legislature, the Constitution requires that agencies carry out only those duties assigned them by the Legislature expressly or by necessary implication (*see Matter of Beer Garden, Inc. v. New York State Liquor Auth.*, 79 N.Y.2d 266, 276 [1992]). There is no legislative authorization for State agencies to promulgate regulations for the oversight of casino gambling. The compacts therefore have usurped the Legislature's power.

The State argues that by passing certain appropriation bills, the Legislature has signaled its approval of the compact. We disagree. Those enactments are no substitute for approval or total ratification. The Legislature has been free to ratify the compact but, as yet, has not done so. Indeed, the State Assembly in a resolution expressly opposed the Governor's unilateral action in negotiating and signing the compact. The resolution asked the Secretary of the Interior not to approve any compact unless approved by the Legislature. The Assembly stated that "[a]ny compact permitting casino gambling necessarily requires at a minimum the exercise of legislative power with respect to regulatory appropriations and related police powers," and that therefore "[t]he Governor lacks authority to act on behalf of the State to enter into a Tribal-State compact" (Res of Assembly A 2413 [1996]). This expression does not square with the State's claim that the Legislature has impliedly approved the compact.

Unsurprisingly, every State high court to consider the issue has concluded that the State Executive lacks the power unilaterally to negotiate and execute tribal gaming compacts under IGRA.[11] New Mexico, Kansas and Rhode Island have each concluded that gaming compacts incorporate policy choices reserved for the Legislature (*see State ex rel. Clark v. Johnson*, 904 P.2d 11 [NM 1995]; *State ex rel. Stephan v. Finney*, 836 P.2d 1169 [Kan 1992]; *Narragansett Indian Tribe v. Rhode Island*, 667 A.2d 280 [RI 1995]; *see also McCartney v. Attorney General*, 587 NW2d 824, 827 [Mich.App 1998], *appeal denied* 601 NW2d 101 [Mich 1999] ["[T]he Governor has the ability to enter into compacts with Indian tribes, subject to the approval of the Legislature"]). Today we join those states in a commitment to the separation of powers and constitutional government.

VIII. The Constitutional Anti-Gambling Provision

The parties have argued the applicability of the State Constitution's anti-gambling provision (N.Y. Const art I, § 9). In light of our disposition of the separation of powers question, it is unnecessary for us to reach that argument, and there are compelling reasons not to do so at this time. Indeed, anything we would say in that regard would be dictum, inasmuch as the separation of powers point is an independent ground for invalidating the compact.

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11. Mississippi allows its Governor the unilateral authority to negotiate and sign compacts (*see Willis v. Fordice*, 850 F Supp 523 [SD Miss 1994], *affd without opn* 55 F3d 633 [5th Cir 1995]). The Mississippi Constitution, however, vests residual powers with the Governor. By contrast, New York places residual policymaking responsibility with the Legislature.

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Neither the trial court nor the Appellate Division addressed the anti-gambling provision, and it is unwise for us — as a court of last resort — to initiate the discussion. Supreme Court did not discuss the article I, section 9 constitutional issue at all, and the Appellate Division made only a reference to it. Clearly, it is better for this Court not to resolve constitutional questions unaddressed by the lower courts (*see Bernstein v. Bodean*, 53 N.Y.2d 520, 529-530 [1981]; *Comiskey v. Arlen*, 43 N.Y.2d 696, 698 [1977]; *see also Schiavone v. City of New York*, 92 N.Y.2d 308, 317 [1998]).

Judge Read's arguments in favor of the compact's compatibility with article I, section 9, and the contrary views of Judge Smith, strengthen our belief that further development of the issue by the courts below is desirable, if not necessary. Judge Read and Judge Smith debate the applicability of *Cabazon* to the article I, section 9 issue. While their insights are illuminating, we note that the lower courts did not cite, let alone address, *Cabazon* or other possibly relevant cases. They did not determine whether the compacts could survive an article I, section 9 challenge. The Appellate Division's reference to the provision did not involve the treatment that should precede this Court's review of an issue of that magnitude. The question of the compact's compatibility with the Constitution's anti-gambling provision is far too important for us to address in this legal vacuum. Furthermore, the parties have informed us that a case pending before the lower courts squarely addresses the question of the applicability of the State Constitution's anti-gambling provision.

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Accordingly, the order of the Appellate Division should be modified, with costs to plaintiffs, by vacating on the ground of mootness so much of the order as declared the May 27, 1999 amendment to the 1993 Tribal-State Gaming Compact void and unenforceable and, as so modified, affirmed.

Appendix A

SMITH, J. (concurring in part and dissenting in part).

I agree with the Majority that the 1993 Compact violates the New York State Constitution in that the Legislature and not the Governor is given policy making authority. In addition, because article I, § 9 of the New York State Constitution clearly forbids the gambling permitted by the 1993 Compact, I would reach that issue.[1]

As noted by the Court's opinion, the New York State Constitution authorizes the Legislature and not the Governor to set policy. It reads:

> "The legislative power of this state shall be vested in the senate and the assembly "(N.Y. Const art III, § 1). "The executive power shall be vested in the governor * * *." (N.Y. Const art IV, § 1). "The Governor shall communicate by message to

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1. I agree with the Majority that the plaintiffs have standing under State Finance Law § 123-b. I agree with the Appellate Division that several organizations, having alleged cognizable harm to their members, also have standing. As stated by the Appellate Division in its August 24, 2000 opinion: "New Yorkers for Constitutional Freedoms is a not-for-profit corporation representing approximately 1,650 churches and groups throughout the State whose individual members are opposed to casino gambling and support the constitutional operation of government. The Coalition Against Casino Gambling is a not-for-profit association whose individual members reside primarily in the Catskills and are opposed to casino gambling in that region. Similarly, the Western New York Coalition Against Casino Gambling is an unincorporated association representing religious organizations and grassroots citizens who oppose casino gambling in this State" (275 A.D.2d 145, 155-156).

> the legislature at every session the condition of the state, and recommend such matters to it as he or she shall judge expedient. The Governor shall expedite all such measures as may be resolved upon by the legislature, and shall take care that the laws are faithfully executed" (N.Y. Const art IV, § 3).

It is equally true, however, that the Constitution forbids gambling, except for limited exceptions, and prohibits commercialized gambling. It reads:

> "[E]xcept as hereinafter provided, no lottery or the sale of lottery tickets, pool-selling, bookmaking, or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature, the net proceeds of which shall be applied exclusively to or in aid or support of education in this state as the legislature may prescribe, and except pari-mutuel betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government, shall hereafter be authorized or allowed within this state; and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section" (N.Y. Const art I, § 9[1]).

Before the first New York State Constitution was written in 1777, gambling in New York was forbidden. Colonial

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Governor Tryon was appointed by the King of England in February 1771.[2] He served as Governor until after the Revolution began, leaving office on March 23, 1780. The commission and instructions issued to Tryon upon his appointment prohibited gambling, referred to as "lotteries:"

> "Whereas, a practice hath of late years prevailed in several of our colonies and plantations in America of passing laws for raising money by constituting public lotteries, and whereas, it hath been represented unto us that such practice doth tend to disengage those who become adventurers therein from that spirit of industry and attention to their proper callings and occupations on which the public welfare so greatly depends, and whereas, it further appears that this practice of authorizing lotteries by acts of legislature hath been also extended to the enabling private persons to set up such lotteries, by means whereof great frauds and abuses have been committed, it is therefore our will and pleasure that you do not give your assent to any act or acts for raising money by the institution of any public or private lotteries whatever until you shall have first transmitted unto us by one of our principal secretaries of state a draught or draughts of such act or acts, and shall have received our direction thereupon."

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2. Governor William Tryon took his oath of office on July 9, 1771.

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The original Constitution of 1777 does not mention gambling or lotteries. Lotteries were again specifically prohibited in the Second Constitution, approved in 1821. Article 7 § 11 provided: "No lottery shall hereafter be authorized in this state; and the legislature shall pass laws to prevent the sale of all lottery tickets within this state, except in lotteries already provided for by law."

In the Third Constitution, approved in 1846, Article 1 § 10 prohibited gambling in almost identical language to the previous Constitution: "nor shall any lottery hereafter be authorized, or any sale of lottery tickets allowed within this state."

The Fourth Constitution, approved in 1894, specifically prohibited gambling in Article 1 § 9. In addition to prohibiting lotteries and gambling in general, this section singled out pool-selling and bookmaking as well. It read: "nor shall any lottery or the sale of lottery tickets, pool-selling, book making, or any other kind of gambling hereafter be authorized or allowed within this state."

In 1938 the Fifth and current Constitution was approved. This Constitution maintained the general prohibition against gambling but did authorize a limited range of gambling. Article 1 § 9(1) provides:

> "except as hereinafter provided, no lottery or the sale of lottery tickets, pool-selling, bookmaking, or any other kind of gambling, except lotteries operated by the state * * * may be authorized and prescribed by the legislature."

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Art. 1 § 9(2) provides:

> "any city, town or village within the state may by an approving vote of the majority of the qualified electors * * * voting on a proposition * * * at a general or special election * * *, subject to state legislative supervision and control, * * * conduct * * * the following categories of games of chance"
>
> "(a) bingo or lotto, in which prizes are awarded on the basis of designated numbers or symbols on a card conforming to numbers or symbols selected at random."
>
> "(b) games in which prizes are awarded on the basis of a winning number or numbers, color or colors, or symbol or symbols determined by chance from among those previously selected or played, whether determined as the result of the spinning of a wheel, a drawing or otherwise by chance."

Subdivision two goes on to provide that "only bona fide religious, charitable or non-profit organizations of veterans, volunteer firefighters and similar non-profit organizations shall be permitted to conduct such games."

Additionally, subdivision two provides that "[t]he legislature shall pass appropriate laws to effectuate the purposes of this subdivision, [and] ensure that such *games are rigidly regulated to prevent commercialized gambling*" (emphasis added).

Consistent with this latter provision, the Legislature has outlawed most forms of gambling (*see* Penal Law article 225). As noted in the Practice Commentary to article 225, "With certain exceptions, gambling is prohibited by the New York State Constitution [article I, § 9]."

The Indian Gaming Regulatory Act, 25 USC § 2703, does not require that gambling be imposed upon states where it is forbidden. 25 USC § 2701(5) provides:

> "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law *and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity*" (emphasis added).[3]

The Indian Gaming Regulatory Act defines three classes of gaming. Class I gaming means "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations" (25 USC § 2703[6]). Class II gaming is defined in 25 USC § 2703(7)(A) which provides:

> "the term 'class II gaming' means —
>
> (i) the game of chance commonly known as bingo
> * * * —

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3. While the dissent cites Connecticut as support for its position that Type III gambling should be permitted here, the Connecticut Constitution does not have anti-gambling provisions similar to those in the New York Constitution.

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards, including * * * pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) card games that —

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State."

The statute further defines what class II gaming does not include. 25 USC § 2703(7)(B) provides:

"The term 'class II gaming' does not include —

(i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or

> (ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind."

The term Class III gaming is defined in 25 USC § 2703(8) and provides:

> "The term 'class III gaming' means all forms of gaming that are not class I gaming or class II gaming."

In violation of article 9, § 1, the 1993 Compact authorizes Type III commercial gambling. The preamble to the 1993 Compact, entitled "Tribal-State Compact between the St. Regis Mohawk Tribe and the State of New York" refers to Class III gambling and states "WHEREAS, the St. Regis Mohawk Tribe and the State of New York have mutually agreed, * * * to the following provisions governing the conduct of Class III gaming activities on the lands of the Tribe * * * [to] (b) develop and implement a means of regulation for the conduct of Class III gaming on Indian lands * * *." Section 3(a) of the Compact refers to Appendix A for a list of games to be conducted under the Compact. Included in this list are Baccarat and Blackjack, two games which are specifically carved out as being class III gaming (see 25 USC § 2703[7][B][i] and [8]). Not only does the 1993 Compact authorize Class III gaming, it also involves the State of New York in the investigation and maintenance of the gambling facility. The Tribe is to reimburse the State of New York for its expenses.

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The 1999 Amendment to the Compact was equally violative of the New York State Constitution in that it sought to allow computerized versions of class III gaming. The record indicates that despite the expiration of this amendment and the fact that its validity is a moot issue, the gambling authorized by that amendment continues today and is an issue before this Court.

Type III gaming is against public policy and has been since before this State's first Constitution. Moreover, Penal Law § 225.05 provides, "A person is guilty of promoting gambling in the second degree when he knowingly advances or profits from unlawful gambling activity." The Penal Law further defines what constitutes advancing gambling activity:

> "A person 'advances gambling activity' when, acting other than as a player, he engages in conduct which materially aids any form of gambling activity. Such conduct includes but is not limited to conduct directed toward the creation or establishment of the particular game, contest, scheme, device or activity involved, toward the acquisition or maintenance of premises, paraphernalia, equipment or apparatus thereof, toward the solicitation or inducement of persons to participate therein, toward the actual conduct of the playing phases thereof, toward the arrangement of any of its financial or recording phases, or toward any other phase of its operation" (PL § 225.00[4])."

California v. Cabazon Band of Mission Indians (480 US 202 [1987])[4] does not negate the more than 200-year-old New York anti-gambling policy. First, the case did not involve a State like New York with a clear anti-gambling policy. In the course of the *Cabazon* opinion, the Supreme Court stated, "In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular" (480 US, at 211). Second, no Compact between a state and an Indian tribe was involved. The issue was not, as here, whether a Compact violated the State Constitution but whether a California statute and county ordinances dealing with bingo and other forms of gambling were criminal or civil for purposes of Pub L 280.

A review of the facts in *Cabazon* makes clear that it is distinguishable from the case before us. The Cabazon and Morongo Bands of Mission Indians occupy reservations in Riverside County, Cal. Each Band conducts bingo games, open to the general public, on their reservations. The Cabazon Band also operates a card club for playing draw poker and other card games, which are open to the public.

California, which permits only charitable organizations to play bingo, sought to enforce an anti-bingo statute (Cal.Penal Code Ann. § 326.5 [West Supp.1987]). Riverside County sought to enforce an anti-bingo ordinance and

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4. Nothing requires this Court to await a lower court's view of a case before addressing that case.

ordinances prohibiting draw poker and other card games (Ordinance No. 558 and Ordinance No. 331). The actions of the State and County were taken pursuant to Pub L 280.

The Tribes sued the County in Federal District Court seeking a declaratory judgment that the defendants had no authority to apply its laws inside the reservations and an injunction against their enforcement. The State intervened. The District Court granted the Tribes' motion for summary judgment, holding that neither the State nor the County had any authority to enforce its gambling laws within the reservations. The Court of Appeals affirmed, stating that State laws may be applied to tribal Indians on their reservations if Congress has expressly consented.[5]

Pub L 280 gave California and five other states jurisdiction over specified areas of Indian lands. California was given broad authority to enforce its criminal laws on Indian lands. It was given only limited authority to enforce its civil laws on Indian lands so as not to attempt a total assimilation of Indian tribes, which retain attributes of sovereignty, into American society. The question in this case was whether the anti-gambling laws were primarily criminal or civil in nature.

The Court of Appeals distinguished a state's "criminal/prohibitory" laws and state "civil/regulatory" laws as follows: "if the intent of a state law is generally to prohibit certain

5. Under 18 USC 1162 and 28 USC 1360, Congress expressly granted six States the right to enforce their laws (both civil and criminal) over Indian tribes: Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin.

conduct, it falls within Pub.L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/ regulatory and Pub.L. 280 does not authorize its enforcement on an Indian reservation" (480 US, at 209).

In affirming, the U.S. Supreme Court agreed with this distinction while noting this "is not a bright-line rule" and left room for the argument that the bingo statute is prohibitory rather than regulatory (*Id.* at 210). Thus, the Supreme court concluded that the California statutes and ordinances regulating gambling were regulatory and civil, and not criminal and prohibitory, for purposes of Pub L 280.

Finally, I agree with the Appellate Division that the commercialized gambling authorized by the 1993 Compact is a clear violation of the Constitution.[6] That court stated:

> "Under the circumstances, we conclude that the commercialized Las Vegas style gambling authorized by the compact is the antithesis of the highly restricted and 'rigidly regulated' (N.Y. Const, art I, § 9[2]) forms of gambling permitted by the N.Y. Constitution * * * disfavoring gambling." (*Saratoga County Chamber of Commerce Inc. v. Pataki*, 293 A.D.2d 20, 24 [2002]).

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6. The petitioners in both cases have add.essed article I, § 9, arguing that it prohibits the gambling authorized by the 1993 Compact.

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The People of the State of New York have decided in New York's Constitution to prohibit commercial gambling.[7] If the elected representatives of the People want to change that policy, they should begin the process of amending the Constitution.[8]

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7. All of those who negotiated the 1993 compact, as well as those who passed budgetary provisions in its support, were well aware of the anti-gambling provisions of the New York State Constitution. The specific gambling permitted in article I, § 9 is in no way authority to permit commercial gambling.

8. Following oral argument in this case, the Attorney General submitted to this Court a Memorandum of Understanding between the State of New York and the Saint Regis Mohawk Tribe. Among the provisions of the Memorandum are (1) a casino to be built in Sullivan County for Class III gambling, (2) the prohibition of any slot machines by entities other than Indian tribes acting pursuant to IGRA in the geographic areas of Bronx, Delaware, Greene, Kings, New York, Orange, Queens, Richmond, Rockland, Sullivan and Ulster counties and (3) payments to New York State of twenty per cent of the proceeds from slot machines for the first four years of a Compact and twenty-five per cent for the period after four years.

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READ, J. (dissenting).

In late 1993, then Governor Mario M. Cuomo signed a tribal-State compact with the St. Regis Mohawk Tribe to regulate Indian gaming at a casino on Indian lands, an activity sanctioned by a unique interaction between federal sovereignty over Indian affairs and our State's Constitution and laws. Six years and millions of dollars later, plaintiffs in effect seek to shut down the casino. Under these circumstances, the claims should have been dismissed because the Tribe is an indispensable party. Disregarding the severe prejudice to the Tribe, our colleagues now hold that the 1993 Compact is void and unenforceable on separation-of-powers grounds. In the absence of a dismissal, we believe that this appeal presents two constitutional issues: we find that Governor Cuomo did not violate the separation-of-powers doctrine by signing the 1993 Compact; the 1993 Compact does not contravene Article 1, Section 9 of the Constitution. Thus, we respectfully dissent.

Indispensable Party

The question of whether an Indian tribe is an indispensable party in a State court suit involving a compact entered into pursuant to the federal Indian Gaming Regulatory Act (IGRA) (25 USC § 2701, *et seq.*) is a matter of first impression for this Court.[1] Other states' appellate courts have considered

1. In cases involving public utilities on tribal lands, the Appellate Division has concluded that sovereign immunity requires dismissal if the underlying dispute implicates "the rights and powers" of the tribe (*see Niagara Mohawk Power Corp. v. Anderson*, 258

(Cont'd)

this issue with mixed results.[2] No other state or federal court, however, has grappled with indispensability in light of the extraordinary delay in bringing suit manifest here.[3]

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A.D.2d 958 [4th Dep't 1999] [affirming dismissal of complaint because dispute involving electrical service on reservation implicates rights and powers of tribe, and any judgment in its absence would be incomplete], *appeal dismissed* 93 N.Y.2d 958; *Anderson v. Town of Lewiston*, 244 A.D.2d 965 [4th Dep't 1997] [affirming dismissal of counterclaim and denial of motion to intervene because dispute involving water service on reservation implicates rights and powers of tribe, and any judgment in its absence would be incomplete], *appeal dismissed* 91 N.Y.2d 920; *see also Seneca v. Seneca*, 293 A.D.2d 56 [4th Dep't 2002] [affirming denial of dismissal of complaint because dispute over agreement between purchaser and seller for sale of gas station situated on reservation does not implicate rights and powers of tribe]).

2. *Compare State ex rel. Clark v. Johnson* (904 P.2d 11 [NM 1995] [tribe not indispensable under New Mexico law where writ of mandamus sought because performance of act to be compelled not dependent on tribe's will]) and *Dairyland Greyhound Park, Inc. v. McCallum* (655 NW2d 474, 487 [Wis Ct App] 2002 [tribe not indispensable because otherwise "an important legal issue having significant public policy implications will evade resolution"], *rev denied* 655 NW2d 129 [Wis 2002]) *with State ex rel. Coll v. Johnson* (990 P.2d 1277 [NM 1999] [tribe indispensable in non-mandamus action seeking to halt Indian gaming in New Mexico subsequent to passage of legislation authorizing gaming compacts]); *see also Am. Greyhound Racing, Inc. v. Hull* (305 F3d 1015 [9th Cir 2002] [tribe indispensable within meaning of federal rules where district court was asked to decide if Arizona law permits Indian gaming]).

3. *See e.g. State ex rel Clark v. Johnson* (petition filed less than two months after earliest compact executed); *Connecticut ex rel.*

(Cont'd)

A declaratory judgment does not require the Tribe's presence in order to afford complete relief (see *Klostermann v. Cuomo*, 61 N.Y.2d 525, 538-39 [1984]); however, as a practical matter, an adverse declaratory judgment will "inequitably affect" the absent Tribe. Thus, under the facts of this case, the Tribe is a necessary party under CPLR § 1001(a), as the majority agrees.

Because the Tribe is a necessary party whose sovereign immunity prevents joinder, the statutory factors in CPLR 1001(b) must be weighed to determine whether the litigation should continue without the Tribe. The second factor (the prejudice to the Tribe if the claims proceed in its absence) and the third factor (whether and by whom this prejudice might have been or may be avoided in the future) are related and, in our view, dispositive. After all, the Appellate Division acknowledged that the Tribe would have a viable claim for dismissal on the basis of laches if it were a party (*Saratoga*

(Cont'd)

Blumenthal v. Babbitt (899 F Supp 80 [D Conn 1995] [action to enjoin Secretary of Interior from accepting land into trust filed within days after Secretary's announcement of his intention to do so]); *State ex rel. Coll v. Johnson* (by 1999 State's highest court considers challenge based on state gaming legislation enacted in 1997); *Sac & Fox Nation of Missouri v. Norton* (240 F3d 1250 [10th Cir 2001] [action filed within 30 days to challenge Secretary of Interior's decision to acquire land in trust for tribe and to approve gaming activities on land]); *Dairyland Greyhound Park, Inc v. McCallum* (injunction sought to prevent governor from renewing compacts expiring in 2003 and 2004); *Am. Greyhound Racing, Inc. v. Hull* (injunction sought to prevent governor from renegotiating or renewing compacts expiring in 2003).

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County Chamber of Commerce v. Pataki, 275 A.D.2d 145, 158 [2000] [*Saratoga I*]).

"Laches is defined as 'such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity.' * * * The essential element of this equitable defense is delay prejudicial to the opposing party" (*Schulz v. State of New York*, 81 N.Y.2d 336, 348 [1993] *quoting Matter of Barabash*, 31 N.Y.2d 76, 81 [1972]). The 1993 Compact between the Tribe and the State was approved by the Tribe's chiefs on June 9, 1993 and by Governor Cuomo on October 15, 1993. The Assistant Secretary of the Interior, Indian Affairs, approved the 1993 Compact under IGRA on December 4, 1993. The Tribe opened its $30 million casino on April 10, 1999, five years later.

These lawsuits, however, were not commenced until September 1999, nearly six years after the 1993 Compact became final. Plaintiffs have never offered an explanation for their neglect to sue immediately after the Governor signed the 1993 Compact or the federal government approved it. If plaintiffs had sued even reasonably promptly, the Tribe could have avoided or delayed substantial investments of time and money to develop the casino. At the very least, the Tribe would have been put on notice of plaintiffs' separation-of-powers allegations.

Moreover, the majority focuses its discussion of prejudice solely on whether or not "investors" (whoever they may be) have recouped their $30 million investment in four

years (which, of course, is unknowable since the Tribe is not a party to this litigation). The majority ignores that the prejudice to the Tribe comprises more than dollars spent or profits made: our colleagues do not acknowledge the potential economic threat posed by this litigation to the casino's 400-odd employees and to the Tribe's long-term economic prospects.[4] The Tribe has dedicated ten years to the pursuit of gambling as an economic development plan, and cannot now turn back the clock or "put[ ] genies back in their bottles" (*Schulz*, 81 N.Y.2d at 348).

Nor did the Tribe execute the Compact or develop the casino in disregard of a known substantial separation-of-powers vulnerability. Rather, any such litigation risk that the Tribe might arguably have been aware of early on in 1993 was eclipsed by the Legislature's prompt and consistent support of the 1993 Compact.

Specifically, on July 7, 1993, both houses of the Legislature passed the bill that became Chapter 264 of the Laws of 1993 upon the Governor's approval of it on July 13,

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4. As of April 12, 2002, the Tribe employed 418 people at the casino (*see www.mohawkcasino.com*). The 1993 gaming compact between the State and amicus curiae Oneida Indian Nation has been challenged on grounds essentially identical to those here, and the State lost at the trial court for essentially the same reasons (*Peterman v. Pataki*, Sup Ct, Oneida County, July 17, 2002, McCarthy, J., Index No. 99-533 [time to perfect appeal extended until July 16, 2003]). The Oneida opened the Turning Stone Casino near Utica, New York on July 20, 1993. By April 2002, the Turning Stone Casino was reported to employ 3,300 people and to have an annual payroll of $70 million (George Keller, *Gaming "Transformed" Oneida Nation*, Post Standard [Syracuse] April 18, 2002, Neighbors West at 7).

1993. This legislation granted the State Police and the Division of Criminal Justice Services authority to undertake the responsibilities assigned to them by the 1993 Compact, which had been approved by the Tribe's chiefs in the month prior to this legislation's enactment. Section one of Chapter 264 provides in its entirety as follows:

> "In the event it is established that activity authorized under Public Law 100-497 [IGRA] shall be conducted in this state, notwithstanding any inconsistent provision of law, the New York state division of state police, on behalf of the New York state racing and wagering board, shall be granted access to the criminal history records of the division of criminal justice services, pursuant to subdivision 8-a of section 837 of the executive law, in connection with executing the responsibilities of the New York state racing and wagering board and the division of state police in regard to the regulation, oversight, licensing, or certification, including fingerprinting, criminal history record checks and background investigations of persons applying to engage in such activities. The division of criminal justice services shall submit a fingerprint card, along with the subject's processing fee, to the federal bureau of investigation for the purpose of conducting a criminal history search and returning a report thereon."

In addition, the Legislature for six consecutive years appropriated monies annually for the specific purpose of

supporting oversight and regulatory activities assigned in the 1993 Compact to the Racing and Wagering Board and the State Police. These appropriations were made in anticipation of the opening of the Tribe's casino and were enacted by the Legislature even though the opening was delayed.[5]

Moreover, these appropriations were not opaque or tucked away in some obscure corner of the budget: they were included with appropriations for programs managed by the Racing and Wagering Board and the State Police and were separately denominated as "Special Revenue Funds-Other, Miscellaneous Special Revenue Fund-339, Regulation of Indian Gaming Account." Indeed, on July 12, 1993 — five days after both houses of the Legislature passed the bill that became Chapter 264 of the Laws of 1993 — the Director of the Division of the Budget wrote to both the Speaker of the Assembly and the Senate Majority Leader. He informed them, as required by law, of his intention to transfer monies from the special emergency appropriation in the already enacted Fiscal Year (FY) 1993-94 budget to the Board and the State Police "to enable [these agencies] to engage in certain oversight and regulatory activities in relation to Class III gaming operations as set forth in gaming compacts between the [Mohawk and Oneida] Indian tribes and the State. These transfers are being made to the State Miscellaneous Special Revenue Fund, a Special Revenue Funds-Other and will be reimbursed by the Indian tribes."

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5. Three of the four legislator-plaintiffs voted in favor of Chapter 264. None of the legislator-plaintiffs voted against budget bills including the specific appropriations for the Racing and Wagering Board for fiscal years 1994-95, 1995-96, 1996-97 and 1999-00. Only one of the legislator-plaintiffs voted against these budget bills in the remaining fiscal years.

The majority downplays these appropriations. They might have had a point if the Racing and Wagering Board and the State Police had funded responsibilities assigned to them by the 1993 Compact under the authority of a more generic appropriation for agency operations. We wonder, however, how the Executive may ever be said to have acted without proper legislative authorization when carrying out activities for which the Legislature has earmarked funds.

The majority also relies heavily on a memorandum from Governor Cuomo's Counsel to establish that the Tribe had fair warning of the 1993 Compact's potential vulnerability. First, there is no reason to suppose (or, at least, no reason from the record) that the Tribe was contemporaneously aware of this memorandum, which is dated six days after the Tribe's chiefs approved the 1993 Compact. Second, the Governor's Counsel stated that while "the Governor has the legal authority under IGRA and state law to negotiate and sign an Indian Gaming Compact on the State's behalf," implementing legislation was needed for the Racing and Wagering Board to regulate Indian games; the State Police and the Division of Criminal Justice Services to conduct background investigations of casino employees and contractors; and the necessary appropriations.

The Legislature, in fact, enacted the kind of criminal justice legislation referred to by Governor's Counsel (i.e., Chapter 264 of the Laws of 1993) and made the requisite appropriations. The Legislature has never deemed it necessary to adopt legislation to state specifically that the Racing and Wagering Board may regulate games of chance on Indian lands just as it already regulates charitable games of chance

throughout the State (*see e.g.* L 2001, ch 383). Even if we suppose (again, we have no reason to know from the record) that the Tribe was told during negotiations that specific legislative approval or ratification of any tribal-State gaming compact was required to safeguard against a separation-of-powers attack, the Governor obviously changed his view.[6] Instead, he submitted implementing legislation, which the Legislature promptly passed. In sum, the Tribe reasonably relied on the State's collective actions to conclude that the 1993 Compact was valid.

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6. Contemporaneous newspaper accounts — of which the Tribe might have been aware — indicate that Governor Cuomo wanted the Legislature's "response" to the compact that he was negotiating in 1993 with the Oneida Indian Nation before signing it, but that "[s]ome legislators said that [this was] an attempt to shift responsibility for a decision that could spark opposition"; and "[t]here are also questions as to whether the Legislature has any power to veto the compact" (James Dao, *Accord for a Casino in New York State*, N.Y. Times, Mar 10, 1993, at B1). When Governor Cuomo subsequently signed a tribal-state compact with the Oneida, it was reported as "something of a reversal by Mr. Cuomo, who said that the Legislature needed to authorize state regulation of the casino before he could sign a compact," but that "Republican leaders had said Mr. Cuomo was trying to spread political responsibility for gambling, and they refused to debate the issue until Mr. Cuomo signed the compact." It was further noted that "Mr. Cuomo plans to introduce legislation giving him the authority to spend $2.5 million for state police officers and inspectors for Indian casinos." The spokesperson for the Senate majority leader was quoted as having said that " 'We'll look at any legislation that he sends' " (James Dao, *Cuomo Signs Pact with Indians for Casino in Upstate New York*, N.Y. Times, Apr. 16, 1993, at A1). In fact, as noted in the text, the Legislature passed just such legislation.

Finally, IGRA provides that tribes can only conduct class III gaming activities pursuant to a valid compact negotiated with the state in which the tribe is located (25 USC § 2710[d][1][B]). Since the majority has declared the 1993 Compact void and unenforceable, the Tribe must either shut down the casino immediately[7] or conduct class III gaming in violation of IGRA and without any State regulatory oversight. The National Indian Gaming Commission has enforcement authority for IGRA, and can take action ranging from monetary penalties to forced closure of a casino where a tribe is in "substantial violation" of the statute (25 USC § 2713). The Commission did precisely this in *United States v. Santee Sioux Tribe of Nebraska* (135 F3d 558, 560 [8th Cir 1998], cert. denied 525 US 813), where the tribe has been fined $4 Million and forced to discontinue its class III gaming activities after a seven-year legal battle with the State of Nebraska (*see also Pueblo of Santa Ana v. Kelly*, 932 F Supp 1284, 1290-91 [DNM 1996] [noting US Attorney's warning that continuation of gaming activities in absence of valid compact would subject tribes and pueblos to federal criminal sanctions and forfeiture of their gaming devices], *aff'd* 104 F3d 1546 [10th Cir 1997]). The Tribe should not be exposed to the risk of these significant adverse consequences in light of plaintiffs' prolonged delay in bringing these lawsuits.

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7. The Appellate Division did not anticipate this result: "It is important to note that plaintiffs do not seek to shut down the Tribe's casino located on the Akwesane [sic] reservation insofar as it is operated in accordance with the original compact" (*County of Saratoga Chamber of Commerce, Inc. v. Pataki*, 293 A.D.2d 20, 22 [2002] [Saratoga II]).

Appendix A

A finding that the Tribe is an indispensable party in these cases does not establish a per se rule that Indian tribes are indispensable parties whenever a claim is brought in State court involving Indian gaming. For instance, since only four months elapsed between the execution of the 1999 Amendment and the filing of plaintiffs' complaints, the same analysis might have yielded a different result had the 1999 Amendment presented a live controversy.

The Appellate Division concluded in *Saratoga I* that the constitutional nature of plaintiffs' claims outweighed any prejudice to the Tribe, and therefore the Tribe was not indispensable. The majority agrees, although in *Schulz* we held that a citizen-taxpayer's 11-month post-enactment delay in challenging the constitutionality of State financing measures sufficiently disrupted expectations so as to foreclose judicial review. In light of the "profound destabilizing and prejudicial effects from delay" (81 N.Y.2d at 348) caused by these vastly more belated lawsuits, we can only conclude that the Appellate Division abused its discretion as a matter of law when it allowed the suit to continue without the Tribe.

IGRA/Separation of Powers

Our analysis of the merits starts with the Constitution's implied separation-of-powers doctrine which "requires that the Legislature make the critical policy decisions, while the executive branch's responsibility is to implement those policies" (*Bourquin v. Cuomo*, 85 N.Y.2d 781, 784 [1995]). The distinction between legislative (policy making) and executive (policy implementing) functions is not black

and white. Rather, "[i]t is only when the Executive acts inconsistently with the Legislature, or usurps its prerogatives, that the doctrine of separation is violated" (*Clark v. Cuomo*, 66 N.Y.2d 185, 189 [1985]; *Broidrick v. Lindsay*, 39 N.Y.2d 641 [1976]). While the majority labels as critical policy choices various subjects related to the operation of gaming activities and includible in a tribal-State compact, what plaintiffs challenge in these cases is more fundamental; namely, the decision to authorize on-reservation class III Indian gaming.

Any discussion of what "critical policy choices" were available to the Legislature on this score starts with the recognition that Indian commerce is an area "under the exclusive control of the Federal Government" (*Seminole Tribe of Florida v. Florida*, 517 US 44, 72 [1996]). "The traditional notions of Indian sovereignty provide a crucial 'backdrop' against which any assertion of state authority must be assessed" (*Gaming Corp. of America v. Dorsey & Whitney*, 88 F3d 536, 547 [8th Cir 1996], citing *White Mountain Apache Tribe v. Bracker*, 448 US 136, 143 [1980]).

Faced with the question of whether a state could enforce its gambling laws on an Indian reservation, the United States Supreme Court in *California v. Cabazon Band of Mission Indians* (480 US 202 [1987]) reiterated the long-established rule that "Indian tribes retain attributes of sovereignty over both their members and their territory, and that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States" (*id.* at 207) (internal citations omitted). Moreover, "state laws may be applied to

tribal Indians on their reservations [only] if Congress has expressly so provided" (*id.*).

In interpreting pre-IGRA law, the Supreme Court held that if a state merely "regulates" gambling (*i.e.*, through its civil laws), tribes must be allowed to conduct gambling on their reservations free from the state's gambling regulations. If, however, a state "prohibits" gambling (*i.e.*, through its criminal laws), tribes are forbidden from gambling and the state may enforce its laws.

The most controversial aspects of IGRA, which codified *Cabazon* with important modifications and "expressly preempt[ed] the field in the governance of gaming activities on Indian lands" (S Rep No. 446, 100th Cong, 2d Sess, at 6, reprinted in 1988 U.S. Code Cong & Admin News, at 3071, 3076; *see Gaming Corp.*, 88 F3d at 544-549), cover class III gaming activities. These include pari-mutuel horse race wagering, lotteries, banking card games such as baccarat, chemin de fer and blackjack, electronic or electromechanical facsimiles of any game of chance, and slot machines (25 USC § 2703[7][B]; 25 CFR 502.4[d]).[8]

IGRA continues the pro-Indian *Cabazon* holding by providing that class III gaming could be conducted in a "State that permits such gaming for *any* purpose by *any* person, organization, or entity" (25 USC § 2710[d][1][B]) (emphasis added). IGRA also, however, pays heed to states'

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8. We note that neither the 1993 Compact nor the 1999 Amendment authorized the Tribe to possess or operate slot machines at the casino.

apprehensions over unregulated Indian gaming by directing that a tribe can conduct class III gaming *only* pursuant to a "Tribal-State compact entered into by the Indian tribe and the State * * * that is in effect" (25 USC § 2710[d][1][C]).

IGRA also contains enforcement provisions to require that where a state permits class III gaming, it must negotiate in good faith with a tribe for a compact upon the tribe's request (*see Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024 [2d Cir 1990], *cert denied* 499 US 975). If negotiations prove fruitless, the tribe can sue the State in federal court. If the state invokes sovereign immunity, the Secretary has authority to mediate the dispute and impose compact terms.[9]

In summary, IGRA mandates that, if a state allows *any* class III gaming by *any* person, a tribe may seek to conduct the same games on their lands. Moreover, the Second Circuit has firmly rejected the notion (unsuccessfully advanced by the State of Connecticut) that a state that allows only charities to engage in regulated casino-type gambling prohibits class III gaming activities for purposes of IGRA (*id.* at 1031-1032). States that allow charities to conduct class III gaming must negotiate in good faith with a Tribe wishing to do the same.

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9. *See* 25 USC § 2710(d)(7) (authorizing tribe to sue state in federal court where state fails to negotiate in good faith); *Seminole Tribe v. Florida*, 517 U.S. 44 [1996] (invalidating IGRA, on Eleventh Amendment grounds, to the extent it allows tribes to sue states in federal court for a failure to negotiate in good faith); and 25 CFR Part 291 (authorizing Secretary of the Interior to mediate and impose compacts if state invokes sovereign immunity); *but see Florida v. United States*, Docket No. 4:99CV137-RH, ND Fla, filed April 12, 1999 [challenging Part 291]).

Appendix A

New York has not outlawed all gambling for more than six decades. For better or worse, New Yorkers have adopted a public policy that permits considerable gambling, although regulated. This public policy is embodied in Article I, Section 9 of the Constitution, which contains statements purporting to ban gambling, but — significantly, for purposes of IGRA — explicitly authorizes four exceptions: 1) pari-mutuel horse racing; 2) a State-operated lottery for education; 3) bingo for certain non-profit organizations; and 4) "games of chance" for these same organizations. Games of chance are defined in the Constitution as follows:

> "games in which prizes are awarded on the basis of a winning number or numbers, color or colors, or symbol or symbols determined by chance from among those previously selected or played, whether determined as the result of the spinning of a wheel, a drawing or otherwise by chance."

The Games of Chance Licensing Law (article 9-A of the General Municipal Law) empowers the Racing and Wagering Board to "[s]upervise the administration of the games of chance licensing law and to adopt, amend and repeal rules and regulations governing the issuance and amendment of licenses thereunder and the conducting of games under such licenses" (General Municipal Law § 188-a). Section 186(3) of the General Municipal Law defines "games of chance" to include and exclude specific types of games; and delegates to the Board the authority to add such "other specific games" to the list of approved games of chance as fall within the confines of what is allowed in the Constitution (*i.e.* games

"in which prizes are awarded on the basis of a winning number or numbers, color or colors, symbol or symbols determined by chance"). To similar effect, 9 NYCRR Part 5620.1 lists Board-approved games, but also authorizes "any other game of chance which has been approved in writing by the board." Finally, article 16 of the Tax Law (the New York State Lottery for Education Law) authorizes the Division of the Lottery, among other things, to determine the type of lottery to be conducted (Tax Law § 1604[a][1]).

Plaintiffs do not challenge the constitutionality of any of the 26 specific games of chance listed in the 1993 Compact.[10] Plaintiffs do not contend that any of the games listed in the 1993 Compact are not among the numerous class III games that are already being conducted by non-profit organizations and others in the State. Nor do they dispute the State's evidence that, as of January 12, 2001, the Racing and Wagering Board had issued games-of-chance identification numbers to 6,840 organizations. According to the Board's records for calendar year 1999, 2,125 authorized organizations were licensed to conduct bell jar games of chance. These organizations had a total handle of

10. We express no opinion as to the constitutionality of any of the games included in the 1993 Compact. We note, however, that the question is not whether these games may be characterized as Las Vegas-style or commercialized gambling, but whether a particular game is a "game[ ] of chance" or "lottery" within the meanings of those terms in our Constitution and laws, and requires a detailed analysis of how each game is played (*see e.g. Trump v. Perlee*, 228 A.D.2d 367 [1st Dep't 1996][electronic game, Quick Draw, offered in the State Lottery, contains all essential features of lottery and does not go beyond type of lottery contemplated by Constitution]).

$298,598,154 from which a net profit of $51,646,037 resulted. With respect to other types of games of chance, $1,443,957 in net profits were raised by casino-style gaming from a handle of $3,011,913. According to the Division of the Lottery's Annual Report, in FY 2002-2003 the Division awarded $3.1 billion in prizes. In short, while regulated by the Racing and Wagering Board and the Division of the Lottery, gambling is commonplace in New York notwithstanding Article I, Section 9's general condemnation of it.

When Congress enacted IGRA pursuant to its plenary authority over Indian affairs, it legislated for all 50 states to allow sovereign nations (Indian tribes) to conduct class III gaming activities within States' borders. In this situation, the "critical policy decision" challenged by plaintiffs — to authorize on-reservation class III Indian gaming — derives from the unique interplay between IGRA and our State's Constitution and statutes. The Governor's recognition that class III Indian gaming is mandated in New York by federal law, given policy choices embodied in the New York Constitution and State law, did not constitute policy making. In executing the 1993 Compact, which regulates the Tribe's conduct of class III gaming at its on-reservation casino, the Governor was merely implementing pre-existing federal and State policy choices.

Whatever the case may be in other states, in New York, the Governor enjoys broad powers to enforce legislation and great flexibility in determining the methods of enforcement. For example, we have in recent years affirmed the Governor's authority to create entire new agencies with new duties for consumer advocacy based principally on a legislative policy as general as article 20 of the Executive Law, which

empowers the Consumer Protection Board to "promote and encourage the protection of the legitimate interests of consumers within the state" (*Borquin*, 85 N.Y.2d at 785-786; *see also Clark*, 66 N.Y.2d at 190 [statute providing that State Board of Elections "shall have the power and duty * * * to encourage the broadest possible voter participation in elections" sufficiently articulated legislative policy to support Governor's creation of multi-agency voter-registration program]). The underlying legislative policy decisions here are more robust and detailed than were the legislative policy decisions implicated in *Borquin* and *Clark*. On this record, we find no separation-of-powers violation.

Conclusion

The majority portrays the issues on this appeal as "fundamental and of immense public significance," which demand resolution despite the prejudice to the absent Tribe. The majority then stops short, leaving for another day "the question of the applicability of the State Constitution's anti-gambling provision." Thus, our colleagues prolong constitutional uncertainty and create substantial hardships for the Tribe, not to mention for the casino's employees and the surrounding communities. Moreover, because of the nature of plaintiffs' claims, we do not see how the majority can sidestep deciding whether Article I, Section 9 prohibits class III gaming on Indian lands once the merits are reached.

In their briefs, during the course of two oral arguments and in several post-argument submittals, plaintiffs continuously pressed their position that the class III gaming conducted at the casino under the 1993 Compact is prohibited by Article I, Section 9 of the New York State Constitution.

Simply put, plaintiffs argue (and Judge Smith in his dissent agrees) that in light of Article I, Section 9's ban of "commercialized gambling," the Governor lacks any power to enter into a compact authorizing the Tribe to conduct Las Vegas-style gaming on Indian lands — with or without the Legislature's approval or ratification. The State takes the opposite view.

The majority opines that, *assuming* the Legislature may constitutionally authorize the Governor to enter into a tribal-State compact for on-reservation class III gaming, the Legislature did not do so on the facts presented. In our view, the underlying constitutional issue is ripe for decision in this case once the merits have been reached. Further delay benefits no one — not those who may now seek legislative ratification of existing tribal-State compacts; not those who oppose Indian gaming.

For all the reasons given, we would reverse the order of the Appellate Division and dismiss both complaints.

* * * *

Order modified, with costs to plaintiffs, by vacating on the ground of mootness so much thereof as declared the May 27, 1999 amendment to the 1993 Tribal-State Gaming Compact void and unenforceable and, as so modified, affirmed. Opinion by Judge Rosenblatt. Chief Judge Kaye and Judge Ciparick concur. Judge Smith concurs in part and dissents in part in an opinion, dissenting as to part VIII of Judge Rosenblatt's opinion. Judge Read dissents and votes to dismiss the actions in an opinion in which Judges Wesley and Graffeo concur.

Decided June 12, 2003

Appendix A

STATE OF NEW YORK
COURT OF APPEALS

3 No. 42

(Action No. 1)

Saratoga County Chamber of Commerce Inc., et al.,

Respondents,

v.

George Pataki, as Governor of the State of New York, et al.,

Appellants.

(Action No. 2)

Keith L. Wright, & c., et al.,

Respondents,

v.

George Pataki, as Governor of the State of New York, et al.,

Appellants.

Appendix A

HON. JUDITH S. KAYE, *Chief Judge, presiding.*

The appellants in the above entitled appeal appeared by Hon. Eliot Spitzer, Attorney General of the State of New York; the respondents appeared by O'Connell & Aronowitz and Jay Goldberg, P.C.; and the amicus curiae appeared by William W. Taylor, Esq.

The Court, after due deliberation, orders and adjudges that the order is modified, with costs to plaintiffs, by vacating on the ground of mootness so much thereof as declared the May 27, 1999 amendment to the 1993 Tribal-State Gaming Compact void and unenforceable and, as so modified, affirmed. Opinion by Judge Rosenblatt. Chief Judge Kaye and Judge Ciparick concur. Judge Smith concurs in part and dissents in part in an opinion, dissenting as to part VIII of Judge Rosenblatt's opinion. Judge Read dissents and votes to dismiss the actions in an opinion in which judges Wesley and Graffeo concur.

The Court further orders that this record of the proceedings in this Court be remitted to the Supreme Court, Albany County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

s/ Stuart M. Cohen

Stuart M. Cohen, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, June 12, 2003

APPENDIX B — OPINION OF THE NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD DEPARTMENT DATED MAY 2, 2002

SUPREME COURT, APPELLATE DIVISION, THIRD DEPARTMENT, NEW YORK

May 2, 2002

(Action No. 1.)

SARATOGA COUNTY CHAMBER OF COMMERCE INC. et al.,

Respondents,

v

GEORGE PATAKI, as Governor of the State of New York, et al.,

Appellants.

(Action No. 2.)

KEITH L. WRIGHT et al.,

Respondents,

v

GEORGE PATAKI, as Governor of the State of New York, et al.,

Appellants.

* * *

Appendix B

SUMMARY

APPEAL from an order of the Supreme Court (Joseph Teresi, J.), entered April 12, 2001 in Albany County, which, inter alia, granted plaintiffs' motions for summary judgment and declared the 1993 Tribal-State gaming compact and its 1999 amendment void and unenforceable absent legislative approval.

OPINION OF THE COURT

MERCURE, J.P.

The question on this appeal is whether, as the result of the interaction of gaming policies established by the State's Constitution and statutes and federal law, defendant Governor had the authority to execute a Tribal-State compact and amendment with the St. Regis Mohawk Tribe (hereinafter Tribe), allowing certain class III gaming activities on the Tribe's reservation. We hold that because the basic policy decisions underlying the Governor's action have not been made by the State Legislature, the Governor did not have the authority to bind the State by executing the compact or the amendment.

The Indian Gaming Regulatory Act (25 U.S.C. § 2701 *et seq.*) (hereinafter IGRA) was enacted in 1988 for the declared purpose of "provid[ing] a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments" (25 U.S.C. § 2702[1]), while at the same time "provid[ing] a statutory basis for the regulation of

gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players" (25 U.S.C. § 2702[2]). Under IGRA, gaming is divided into three categories. Class III gaming, which is at issue here, is statutorily defined as "all forms of gaming that are not class I gaming or class II gaming" (25 U.S.C. § 2703[8]) and includes pari-mutuel horse race wagering, lotteries, banking card games such as baccarat, chemin de fer, and blackjack, and electronic or electromechanical facsimiles of any game of chance or slot machines of any kind (25 U.S.C. § 2703[7][B]; *see, Hotel Empls. & Rest. Empls. Intl. Union v. Davis,* 21 Cal.4th 585, 596, 981 P.2d 990, 998).

Pursuant to IGRA, Class III gaming activities will be permitted on Indian lands if "located in a State that permits such gaming for any purpose by any person, organization, or entity * * * and conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State" (25 U.S.C. § 2710[d][1][B], [C]; *see, Rumsey Indian Rancheria of Wintun Indians v. Wilson,* 64 F.3d 1250, 1256, *amended* 99 F.3d 321, *cert. denied sub nom. Sycuan Band of Mission Indians v. Wilson,* 521 U.S. 1118). Further, as we held on a prior appeal in this case, we look to state law rather than IGRA to determine whether a state has validly bound itself to a compact (275 A.D.2d 145, 157, 712 N.Y.S.2d 687). In 1993, then-Governor Mario Cuomo entered into a Tribal-State compact with the Tribe, which allowed the Tribe to operate gambling casinos. The Tribe opened the Akwesane Mohawk Casino on its reservation near Hogansburg in

Franklin County on April 10, 1999. On May 27, 1999, the Governor and the Tribe entered into an amendment to the compact to permit the operation of electronic gaming devices, and the Tribe began the operation of these devices the following day.[1]

These actions were commenced in September 1999. The complaints allege in pertinent part that the Governor lacked authority to execute the compact or the amendment[2] and that the types of gambling contemplated by both of them are prohibited by the N.Y. Constitution, criminal statutes, and public policy as enunciated by the Legislature. It is important to note that plaintiffs do not seek to shut down the Tribe's casino located on the Akwesane reservation insofar as it is operated in accordance with the original compact. Plaintiffs do seek to prevent any expansion of the casino operation pursuant to the amendment, including the expansion of the gambling activity onto other sites. On the prior appeal, we denied defendants' motions to dismiss the complaints for failure to join an indispensable party, lack of standing or legal capacity to sue, or as barred by the doctrine of federal preemption, the applicable Statute of Limitations, or laches (275 A.D.2d 145, *supra*). Plaintiffs and defendants thereafter moved for summary judgment. Concluding that,

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1. We are advised that the amendment expired by its own terms on May 27, 2000, that the State and the Tribe were unsuccessful in negotiating a substitute provision satisfactory to the Secretary of the Interior, but that the electronic gaming devices continue in operation.

2. Hereinafter, when the context of our discussion requires no distinction between the 1993 compact and the 1999 amendment, the two will be collectively referred to as the compact.

absent legislative concurrence, the Governor's execution of the compact violated the doctrine of separation of powers, thereby rendering it void and unenforceable, Supreme Court denied defendants' motion and granted plaintiffs' motions. Defendants appeal.

We affirm. Fundamentally, "[t]he constitutional principle of separation of powers, implied by the separate grants of power to each of the coordinate branches of government, requires that the Legislature make the critical policy decisions, while the executive branch's responsibility is to implement those policies" (*Bourquin v. Cuomo,* 85 N.Y.2d 781, 784 [internal quotation marks and citations omitted]; *see, Cohen v. State of New York,* 94 N.Y.2d 1, 11; *Matter of New York State Health Facilities Assn. v. Axelrod,* 77 N.Y.2d 340, 349). Thus, although "there need not be a specific and detailed legislative expression authorizing a particular executive act as long as 'the basic policy decisions underlying the [executive action] have been made and articulated by the Legislature'" (*Bourquin v. Cuomo, supra,* at 785, quoting *Matter of New York State Health Facilities Assn. v. Axelrod, supra,* at 348), "when the Executive acts inconsistently with the Legislature, or usurps its prerogatives, * * * the doctrine of separation is violated" (*Clark v. Cuomo,* 66 N.Y.2d 185, 189; *see, Bourquin v. Cuomo, supra,* at 785; *Boreali v. Axelrod,* 71 N.Y.2d 1; *Rapp v. Carey,* 44 N.Y.2d 157).

The initial task, then, is to ascertain New York's legislative policy on gambling as it existed in the 1990s. Pursuant to N.Y. Constitution, article I, § 9, the only forms of gambling authorized in New York are (1) State-operated pari-mutuel betting on horse races (N.Y. Const., art. I, § 9

[1]), (2) lotteries operated by the State, "the net proceeds of which shall be applied exclusively to or in aid or support of education" (N.Y. Const., art. I, § 9 [1]), and (3) specified "games of chance" conducted only by "bona fide religious, charitable or non-profit organizations of veterans, volunteer fire [fighters] and similar non-profit organizations", and then only if authorized by a majority vote of the electors of the city, town or village in which the gambling is to take place and on the additional conditions that the entire net proceeds be exclusively devoted to the lawful purposes of the organizations and that prizes be limited to $250 for a single prize or $1,000 for a series of prizes (N.Y. Const., art. I, § 9[2]). Notably, N.Y. Constitution, article I, § 9(2) requires the Legislature to "pass appropriate laws to effectuate [its purposes], ensure that [the games of chance] are rigidly regulated to prevent commercialized gambling, [and] prevent participation by criminal or other undesirable elements and the diversion of funds from the [authorized purposes]".

The stated purpose of General Municipal Law article 9-A, which the Legislature enacted pursuant to that constitutional directive, is expressed in the following terms:

> "It is hereby declared to be the policy of the legislature that all phases of the supervision, licensing and regulation of games of chance and of the conduct of games of chance should be closely controlled and that the laws and regulations pertaining thereto should be strictly construed and rigidly enforced; that the conduct of the game and all attendant activities should be so regulated and adequate controls so instituted

> as to discourage commercialization of gambling in all its forms * * * and that the mandate of [N.Y. Constitution, article 1, § 9] should be carried out by rigid regulations to prevent commercialized gambling * * *" (General Municipal I aw § 185).

Under the circumstances, we conclude that the commercialized Las Vegas style gambling authorized by the compact is the antithesis of the highly restricted and "rigidly regulated" (N.Y. Const., art. I, § 9[2]) forms of gambling permitted by the N.Y. Constitution and statutory law and New York's established public policy disfavoring gambling (*see, Ramesar v. State of New York,* 224 A.D.2d 757, 759, *lv. denied* 88 N.Y.2d 811; *accord, Matter of New York Racing Assn. v. Hoblock,* 270 A.D.2d 31, 33-34).

Obviously recognizing that its defense to plaintiffs' separation of powers claim is seriously undermined by New York's long-standing and clearly articulated policy against precisely the type of gambling that the compact authorizes, defendants' primary approach has been to enlist IGRA as evidence of a purported New York policy favoring commercialized casino gambling. Reduced to its essence, defendants' argument is that, because the N.Y. Constitution, statutes and implementing regulations permit every form of gambling authorized by the compact, albeit under rigid controls and limitations not in existence at the Tribe's casino, the "permits such gaming for any purpose by any person, organization, or entity" criterion of 25 U.S.C. § 2710 (d)(1)(B) is satisfied. That being the case, the argument continues, if the Governor had refused to enter into good-faith negotiations culminating in a Tribal-State compact,

IGRA would have authorized the U.S. Secretary of the Interior to impose a compact on the State (*see,* 25 U.S.C. § 2710[d][7]; 25 CFR part 291; *see also, Mashantucket Pequot Tribe v. State of Connecticut,* 913 F.2d 1024, 1032, *cert. denied* 499 U.S. 975; *Yavapai-Prescott Indian Tribe v. State of Arizona,* 796 F. Supp. 1292, 1297-1298). Even accepting these two underlying premises as true, which we do only for the sake of the present argument, we conclude that defendants' argument is nonetheless fatally flawed.

First and most obvious is the fact that the Governor and Congress are not coordinate branches of government, thereby rendering defendants' separation of powers analysis inapt (*see,* N.Y. Const., art. III, § 1; art. IV, § 1; *see also, Clark v. Cuomo,* 66 N.Y.2d 185, 189, *supra*). Although defendants make an attempt to promote this as a "unique" separation of powers case where the challenged executive action supposedly implements existing legislative policy "established through the interplay of policies set by two policy-making bodies—the New York State Legislature and the United States Congress", the fact is that the policy relied upon by defendants derives solely from Federal statutes and implementing regulations. The State Legislature's exclusive role in this matter was to approve highly restrictive statutes and constitutional provisions which, although generally banning gambling and at all times evidencing a strong policy against commercialized gambling, may have unwittingly opened the door to Indian casino gaming through the subsequently enacted IGRA.

Second, defendants' analysis overlooks the critical distinction between the *existence* of a Tribal-State compact

and the *provisions* of such a compact. That is, even if we were to accept the premise that IGRA placed the State in a position where it had no reasonable alternative but to enter into a compact with the Tribe, the fact remains that the Governor lacked authority to define the terms of that compact. As the legislative history of IGRA makes clear, "[a] State's governmental interests with respect to class III gaming on Indian lands include the interplay of such gaming with the State's public policy, safety, law and other interests, as well as impacts on the State's regulatory system, including its economic interest in raising revenue for its citizens" (S. Rep. No. 44, 100th Cong., 2d Sess., at 13, reprinted in 1988 U.S.Code Cong. & Admin. News, at 3071, 3083). Here, the Governor's action deprived the Legislature of any input concerning a number of significant elements, including the location of the casino, the gaming that could be carried on there, the extent of State involvement in providing regulation and a regulatory infrastructure and the fees to be exacted for that regulation (*see, Yavapai-Prescott Indian Tribe v. State of Arizona, supra,* at 1296-1297). These numerous collateral issues affecting the health and welfare of State residents implicate policy choices lying squarely within the province of the Legislature.[3]

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3. As we indicated in our prior decision in this case, it is noteworthy that a number of other jurisdictions have considered the question of whether a governor has the authority to bind a state to an Indian gaming compact, and in every state whose constitution does not grant residual powers to the executive, the litigation resulted in a declaration that the compact is void and unenforceable absent legislative concurrence (*see, Jicarilla Apache Tribe v. Kelly,* 129 F.3d 535, 537 [NM]; *Kickapoo Tribe of Indians v. Babbitt,* 827 F.Supp.

(Cont'd)

Appendix B

As a final matter, we note that defendants expressly disavow any opinion as to whether (1) under IGRA, New York must allow "all forms of Indian gaming" because some types of class III gaming are allowed, (2) IGRA preempted the question of whether the Governor's signature was sufficient to bind the State, and (3) the Legislature ratified the compact by appropriating funds for its implementation and granting the State Police access to the criminal history records of the Division of Criminal Justice Services.

The parties' remaining contentions either need not be addressed or have been considered and found to be unavailing.

PETERS, SPAIN, CARPINELLO and LAHTINEN, JJ., concur.

Ordered that the order is affirmed, with one bill of costs.

(Cont'd)

37, 46 [Kan], *revd on other grounds* 43 F.3d 1491; *McCartney v. Attorney General,* 231 Mich. App. 722, 727-728, 587 N.W.2d 824, 827, *lv. denied* 460 Mich. 873, 601 N.W.2d 101; *Narragansett Indian Tribe v. State,* 667 A.2d 280, 282 [RI]; *State ex rel. Clark v. Johnson,* 120 N.M. 562, 574, 904 P.2d 11, 23; *State ex rel. Stephan v. Finney,* 251 Kan. 559, 582-583, 836 P.2d 1169, 1185).

APPENDIX C -- DECISION AND ORDER OF THE NEW YORK SUPREME COURT, ALBANY COUNTY DATED APRIL 10, 2001

STATE OF NEW YORK
COUNTY OF ALBANY
SUPREME COURT

INDEX NO. 5507-99

ACTION NO. 1

SARATOGA COUNTY CHAMBER OF COMMERCE, INC., JOSEPH DALTON; NEW YORKERS FOR CONSTITUTIONAL FREEDOMS, LTD.; LEE KARR, Individually and as Chairman of The COALITION AGAINST CASINO GAMBLING, an Unincorporated Association; G. STANFORD BRATTON, Individually and as Coalition Coordinator for the WESTERN NEW YORK COALITION AGAINST CASINO GAMBLING, an Unincorporated Association; the HON. FRANK PADAVAN, a Duly Elected and Serving Member of the New York State Senate; and the HON. WILLIAM PARMENT, a Duly Elected and Serving Member of the New York State Assembly,

Plaintiffs

-against-

GEORGE PATAKI, as Governor of the State of New York, JUDITH HARD, Deputy Counsel to the Governor; and the NEW YORK STATE RACING AND WAGERING BOARD,

Defendants.

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INDEX NO. 11971-99

ACTION NO. 2

KEITH L. WRIGHT, as Member of the New York State Assembly, and LARRY B. SEABROOK, as member of the New York State Senate,

Plaintiffs,

-against-

GEORGE E. PATAKI, as Governor of the State of New York, and THE STATE OF NEW YORK,

Defendants.

Supreme Court Albany County All Purpose Term, March 6, 2001 Assigned to Justice Joseph C. Teresi

* * *

DECISION AND ORDER
RJI NO. 0199059775

TERESI, J.:

Plaintiffs in Action No. 1 and Action No. 2 as well as defendants all move separately for summary judgment pursuant to CPLR 3212. Plaintiffs in Action No. 1 seek an order:

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(a) Declaring illegal the so-called "Tribal State Compact between the St. Regis Mohawk Tribe and the State of New York" (the "Compact"), purportedly entered into in 1993 pursuant to the federal Indian Gaming Regulatory Act ("IGRA") by then-Governor Mario Cuomo, on behalf of the State of New York, to authorize the St. Regis Mohawk Tribe (the "Tribe") to operate a Las Vegas-style gambling casino on the Tribe's Akewesasne Reservation located in upstate New York;

(b) Declaring illegal an amendment to that Compact, dated May 27, 1999, which expired on May 27, 200 (the "Amendment"), purportedly entered into on behalf of the State by Governor Pataki through his agent, Judith Hard, then Deputy Counsel to the Governor, which purports to allow the Tribe to expand its gaming operation to include the use of "electronic video gaming devices," not permitted under the original Compact; and

(c) Enjoining Governor Pataki and the New York State Racing and Wagering Board (which maintains a presence at the casino on the Reservation on a 24-hour basis in order to oversee its operation and to ensure compliance with the Compact as amended) from taking any *further* action, including the expenditure of State funds, to *expand* the operation to include the use of electronic gaming devices on the Reservation pursuant to the Amendment.

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Plaintiffs in Action No. 2 similarly seek an order:

(1) Declaring that any Tribal-State Gaming Compact signed by the Governor is void and unenforceable absent legislative concurrence;

(2) Declaring that the 1993 Tribal-State Compact signed by the Governor with the St. Regis Mohawk Tribe is void and unenforceable;

(3) Permanently enjoining defendants from entering into, or attempting to enter into, or amending any gaming compacts with any Indian tribe without prior legislative concurrence;

(4) Enjoining defendants from any conduct which would expand Indian gambling activity within the State of New York without prior legislative concurrence;

(5) Awarding plaintiffs their costs, attorney's fees; and

(6) Granting such other and further relief as this Court deems just and proper.

Defendants move for summary judgment in favor of all of the defendants and against all of the plaintiffs upon the grounds that plaintiffs' causes of action are not ripe for judicial review; that there are no triable issues of fact and there is no merit to the causes of action asserted in the complaints and amended complaints.

Appendix C

The history of this case is fully outlined in this Court's previous decision, (*Saratoga County Chambers of Commerce Inc. v. Pataki*, Index No. 5507-99, 11971-99, Alb. Sup. Ct., decided March 8, 2000) and the Appellate Division decision of June 9, 2000. (*Saratoga County Chamber of Commerce Inc. v. Pataki*, __ AD2d __, 712 NYS 2d 687, [3d Dept., 2000]).

Initially, the Court will deny the defendants' motion for dismissal on the grounds that the actions are not ripe for judicial review. Defendants maintain that the 1999 Amendment which permitted the Tribe to conduct electronic gaming has expired and absent a new amendment the Court should decline to rule on the Governor's authority to enter the original 1993 compact prior to a new amendment. The Court is mindful that the Appellate Division's decision (*Saratoga County Chamber of Commerce Inc. v. Pataki*, __ AD2d __, 712 NYS 2d 687, [3rd Dept., 2000]) held that "the public interest would be best served by a determination of this litigation on the merits." That Court disposed of all additional issues (standing claims, preemption under Federal Law, statute of limitations and laches) raised on motions to expedite a determination of the actions on the merits. The Court notes that although the "Amendment" has expired the activity plaintiff seeks to enjoin continues. After a full review of this record and the previous Appellate Division's decision this Court declines to dismiss this matter on the grounds of ripeness.

Therefore, the next issue before this Court is whether the Governor of the State of New York is empowered to enter into a Tribal State Gaming Compact absent legislative

concurrence. This Court, with guidance and authority from the Appellate Division and a full review of the record here determines the Governor does *not* have such authority. As previously stated by the Appellate Division, *id.*, and heavily relied upon by plaintiffs:

> "It is noteworthy, we believe, that a number of other jurisdictions have considered the question of whether a governor has the authority to bind a state to an Indian gaming compact, and in every state whose constitution does not grant residual powers to the executive, the litigation resulted in a declaration that the compact is void and unenforceable absent legislative concurrence (*see, Jicarilla Apache Tribe v. Kelly*, 129 F3d 535, 537; *Kickapoo Tribe of Indians v. Babbitt*, 827 F Supp 37, 46, *revd on other grounds* 43 F2d 1491; *McCartney v. Attorney General*, 231 Mich App 722, 727-728, 587 NW2d 824, 827, *lv denied* 460 Mich 873, 601 NW2d 101; *Narragansett Indian Tribe of R.I. v. Rhode Is:*, 667 A2d 280, 292 [RI]; *State ex rel. Clark v. Johnson*, 120 NM 562, 574, 904, P2d 11, 23; *State ex rel. Stephan v. Finney*, 251 Kan 559, 582-583, 836 P2d 1169, 1185). Further, the Court of Appeals has stated that the fundamental and critical policy decisions of this State are the exclusive prerogative of the Legislature (*see e.g., Bourquin v. Cuomo*, 85 NY2d 781, 784; *Matter of New York State Health Facilities Assn. v. Axelrod*, 77 NY2d 340, 349)."

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As demonstrated, the tribal gambling compacts in Kansas, Michigan, Rhode Island and New Mexico were invalidated (by the highest court of each State) absent legislative concurrence or approval. In those states, as in New York, the state's Constitution does not grant residual powers to the executive to bind the State to an Indian Gaming Compact.

The cases cited by the Appellate Division all have a common and clear theme: that the Governor did not have the authority to bind their states with Indian Gambling Compacts absent legislative concurrence or approval. As stated in *Clark v. Johnson*, 120 N.M. 562 (Supreme Court, New Mexico 1995):

> "Under federal law as expressed in the IGRA, Class III gaming activities are lawful on Indian land only if the State permits such gaming "for any purpose by any person, organization, or entity." The compacts negotiated and signed by the Governor authorize gaming that New Mexico law does not permit. For example, New Mexico law does not permit "all forms of casino-style games" as stated in the recitals in the compact with Pojoaque Pueblo.
>
> In addition, the New Mexico Constitution requires legislative approval or ratification of compacts that are otherwise in conflict with state gambling statutes. Under state constitutional separation of powers, the Governor may neither infringe upon legislative authority with respect to existing law

> nor with respect to the power of the legislature to change law in the future. Residual governmental power rests within the legislature. The specific enabling legislation on which the Governor relies is not applicable.
>
> The IGRA does not purport to expand state gubernatorial power. The Governor's power to negotiate and sign the compacts derives from the state constitution and state statues." *Id.*

This is strikingly similar to the present situation.

Also, in *Stephen v. Finney*, 251 Kan 559. (Supreme Court, Kansas 1992). The Court held the Governor of Kansas had power to negotiate compacts but could not bind the state to the terms, and absent "an appropriate delegation of power by the Kansas Legislature or legislature approval of the compact, the Governor had no power to bind the State to the Terms" of the compact. In *Narragansett Indian Tribe of Rhode Island v. State*, 667 AD2d 280 (Supreme Court, Rhode Island 1995) while holding the governor could not bind the state to a compact that Court held:

> "We also take care to note that our opinion in no way suggests that the Governor, in his capacity as Chief Executive officer of this state, lacks the authority to advocate, to initiate, and to negotiate, short of executing, a tribal-state compact. All that we determine herein is that the Governor, absent specific authorization from the General Assembly, had no express or implied constitutional right or

> statutory authority to finally execute and bind the state to such a compact by his execution thereof. [*Id. at 282*]"

The Court in *McCartney v. Attorney General*, 231 Mich App 722 (Court of Appeals, Michigan 1998) also emphasized that there is no constitutional impediment to the Governor's negotiating with an Indian Tribe where the product of his negotiation has no affect without legislative approval.

Similar to those cases, this Court finds that New York's Governors in signing the Indian Gaming Compacts have crossed the line of executive power and entered into the domain of the legislature without proper mandate or authority within the New York State Constitution.

The Court also finds that this ruling is fully consistent with the position taken by defendant in 1992 in *St. Regis Mohawk Tribe v. State of New York and Mario M. Cuomo*, Case No. 91 CV-1117, SDNY. In that case St. Regis Mohawk Indian Tribe filed a lawsuit alleging that the Governor failed to negotiate the terms of the Gaming Compact in good faith. There in an answer filed, in that action by the State, maintained that under New York State Law, "as a matter of sound public policy," the Governor must have legislative authorization in order to conclude a Tribal/State Compact. (Exhibit J at paragraph 4 of Goldberg's Affidavit).

This Court does not find that the Indian Gaming Regulatory Act ("IGRA") nor the level of permitted legal gambling activity in New York has in any way amended New York Law. The 1993 Tribal State Compact denied the type

of fundamental and critical policy decision of this State which is solely within the exclusive prerogative of the Legislature. (*Bourquin v. Cuomo*, 85 NY2d 781, 784).

This Court does find that the Governor has no explicit or implicit authority to bind the State to a Tribal State Gaming Compact without specific legislative approval. Therefore, the next issue is whether the compact and its amendments have been adopted by the Legislature. Defendants claim that legislative adoption is demonstrated by the failure to pass bills requiring legislative concurrence for the State to enter a gaming compact; legislative appropriations for the regulations of gaming; and the enactment of Chapter 264 of the laws of 1993, which gives the New York State Racing and Wagering Board employees access to the criminal history records of perspective casino employees. This Court finds that those actions either singularly or combined do not establish legislative ratification of the compact.

Courts are reluctant to give any weight to legislative inaction (*see*, *Matter of Boreali v. Axelrod*, 71 NY2d 1, 13 (1987). It would seem particularly imprudent in this case to give weight to inaction when in fact the Assembly had passed a resolution in 1996 calling for the need for legislative ratification of the gaming compact. (*See*, New York State Assembly Resolution No. 2413, July 12, 1996 [Exhibit E of Motion Action No. 2]). Nor does the Court interpret Chapter 264 of the Law of 1993 as a ratification of the compact as that statute is prefaced by: "In the event it is established that activity under Public Law 100-497 (IGRA) shall be conducted in this State." Obviously, that language indicates the Legislature's withholding of authority until

legislative approval of a valid compact, as a pre-condition of its validity.

Lastly, the defendants argue that various appropriation bills imply legislative ratification. As stated in *Matter of National Resources Defense Counsel v. New York City Dept. of Sanitation*, 83 NY2d 215 (1994):

> "It is well settled that "[repeal or modification of legislation by implication is not favored in the law" (*Matter of Consolidated Edison Co. v. Department of Envtl. Conservation,* 71 NY2d 186, 195), and that the doctrine will "be resorted only in the clearest of cases" (*Ball v. State of New York,* 41 NY2d 617, 622; *see also,* McGivney's Cons. Laws of NY, Book 1, Statutes § 391)."

The facts here do not establish any similar clear implication and this Court will not abrogate the New York Constitution on the basis of those appropriations.

Therefore, the 1993 Tribal-State Gaming Compact and its May 27, 1999 amendment is declared and found to be void and unenforceable as is any Tribal-State Gaming Compact absent Legislative concurrence. The defendants are permanently enjoined from taking any further actions to implement them, including the expenditure of State funds to expand the operation to include the use of electronic gaming compacts with any Indian Tribe without prior legislative concurrence or approval.

Appendix C

All papers, including this Decision and Order, are being returned to the attorneys for the plaintiffs in Action No. 1. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of that section respecting filing; entry and notice of entry.

SO ORDERED!

Dated: April 10, 2001
Albany, New York

s/ Joseph C. Teresi
JOSEPH C. TERESI

APPENDIX D — OPINION OF THE NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD DEPARTMENT DATED AUGUST 24, 2000

SUPREME COURT, APPELLATE DIVISION, THIRD DEPARTMENT, NEW YORK

August 24, 2000

(Action No. 1.)

SARATOGA COUNTY CHAMBER OF COMMERCE INC. et al.,

Appellants,

v

GEORGE PATAKI, as Governor of the State of New York, et al.,

Respondents, et al., Defendant.

(Action No. 2.)

KEITH L. WRIGHT, as Member of the New York State Assembly, et al.,

Appellants,

v

GEORGE E. PATAKI, as Governor of the State of New York, et al.,

Respondents, et al., Defendant.

Appendix D

OPINION OF THE COURT

MERCURE, J.

I.

The Indian Gaming Regulatory Act (25 USC § 2701 *et seq.*) (hereinafter IGRA) was enacted in 1988 for the declared purpose of "provid[ing] a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments" (25 USC § 2702[1]), while at the same time "provid[ing] a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players" (25 USC § 2702[2]). Under IGRA, gaming is divided into three categories. Class III gaming, which is at issue here, is statutorily defined as "all forms of gaming that are not class I gaming or class II gaming" (25 USC § 2703[8]) and includes pari-mutuel horse race wagering, lotteries, banking card games such as baccarat, chemin de fer and blackjack, and electronic or electro-mechanical facsimiles of any game of chance or slot machines of any kind (25 USC § 2703[7][B]; *see*, *Hotel Empls. & Rest. Empls. Intl. Union v. Davis*, 21 Cal 4th 585, 596, 981 P2d 990, 999).

Class III gaming activities are permitted on Indian lands only if "located in a State that permits such gaming for any purpose by any person, organization, or entity, and * * *

conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State" (25 USC § 2710[d][1][B], [C]; *see, Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F3d 1250, 1256, *cert. denied sub nom. Sycuan Band of Mission Indians v. Wilson*, 521 U.S. 1118). The term "Indian lands" encompasses not only lands within the limits of an Indian reservation but also those held in trust by the United States for the benefit of an Indian tribe (25 USC § 2703[4][A], [B]), including lands acquired in trust by the Secretary of the Interior after October 17, 1988 upon a determination "that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination" (25 USC § 2719[b][1][A]).

In 1993, then-Governor Mario Cuomo entered into a Tribal-State compact with the St. Regis Mohawk Tribe (hereinafter the Tribe) which allowed the Tribe to operate gambling casinos. The Tribe opened the Akwesasne Mohawk Casino on its reservation near Hogansburg in Franklin County on April 10, 1999. On May 27, 1999, defendant Governor George Pataki and the Tribe entered into an amendment to the compact to permit the operation of electronic gaming devices, and the Tribe began the operation of these devices the following day. In addition, on October 29, 1999, the Tribe sought review by the Department of the Interior of the Tribe's application to acquire the property of the former Monticello Raceway in the Village of Monticello, Sullivan County, for the purpose of establishing a class III gaming establishment

there. Following such review, the Secretary of the Interior determined that a gaming establishment on the parcel would be in the best interest of the Tribe and its members and would not be detrimental to the surrounding community. The application now awaits action of the Governor pursuant to 25 USC § 2719(b)(1)(A).

On September 23, 1999, plaintiffs in action No. 1 (hereinafter the Saratoga plaintiffs) commenced an action in Supreme Court, Albany County, against the Governor, the State Racing and Wagering Board, and defendant Judith Hard, a former Counsel to the Governor who signed the May 27, 1999 amendment on behalf of the State. The amended complaint alleges that the Governor lacked authority to execute the compact or the amendment and that the types of gambling contemplated by both of them are prohibited by the New York Constitution, criminal statutes and public policy as enunciated by the Legislature. Plaintiffs therefore seek to nullify the compact and the amendment and to enjoin defendants from further implementing either document, including the expansion of the gambling activity onto other sites. The next day, plaintiffs in action No. 2 (hereinafter the Wright plaintiffs) commenced an action in Supreme Court, New York County, against the Governor and the State seeking similar declaratory and injunctive relief. Defendant Village of Monticello moved in action No. 1 to intervene as a defendant and to consolidate the two actions. On November 18, 1999, Supreme Court granted Monticello's motion to intervene and consolidated the actions, with venue in Albany County.

Appendix D

Defendants[1] moved to dismiss both actions upon the grounds that plaintiffs failed to join an indispensable party, i.e., the Tribe, plaintiffs or certain of them lacked standing or legal capacity to sue, the complaints state a claim for relief which is subject to complete Federal preemption, the complaints are barred by the four-month Statute of Limitations of CPLR 217 and by the doctrine of laches, and certain of plaintiffs' claims are not ripe for judicial review. Monticello asserted a counterclaim against the Wright plaintiffs seeking a declaration that the compact and amendment are valid and enforceable. The Wright plaintiffs moved to dismiss the counterclaim. Monticello cross-moved for summary judgment on its counterclaim. Supreme Court granted defendants' motion to dismiss based upon the failure to join the Tribe, which it concluded was an indispensable party. It did not address any of the other grounds asserted for dismissal or Monticello's cross motion for judgment on its counterclaim. Plaintiffs in both actions appeal.

II.

We are faced with the question of whether the Tribe's sovereign immunity from suit can be invoked by a non-Indian party to foreclose judicial review of the authority of the Governor, acting without legislative approval, to enter into a compact with the Tribe. We conclude that Supreme Court abused its discretion in dismissing the actions based on plaintiffs' inability to join the Tribe as a defendant. The general rule is that "[p]ersons who ought to be parties

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1. "Defendants" shall refer to all defendants in both actions, except Monticello.

if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants" (CPLR 1001[a]). A different rule applies, however, in cases such as this one[2] where jurisdiction cannot be obtained over the nonjoined party without the consent of that party. In such a case, the court may allow the action to proceed in the absence of a necessary party if justice so requires, based on a consideration of (1) whether the plaintiffs have another effective remedy if the action is dismissed for nonjoinder, (2) prejudice to the defendants or the person not joined, (3) whether and by whom prejudice might have been avoided, (4) feasibility of protective orders by the court, and (5) whether an effective judgment may be rendered in the absence of the person not joined (*see*, CPLR 1001[b]). In our view, a balanced consideration of these factors militates against the invocation of the harsh and rarely used remedy of dismissing the complaint for nonjoinder of an indispensable party (*see*, Siegel, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR C3211:34, at 47-48).

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2. It is undisputed that plaintiffs cannot obtain jurisdiction over the Tribe because, as a sovereign Indian nation, it is entitled to immunity from suit in State court (*see, Matter of Ransom v. St. Regis Mohawk Educ. & Community Fund*, 86 NY2d 553, 558) as well as in Federal court (*see, Oklahoma Tax Commn. v. Potawatomi Indian Tribe*, 498 US 505, 509; *Niagara Mohawk Power Corp. v. Tonawanda Band of Seneca Indians*, 862 F Supp 995, 1004, *affd* 94 F3d 747).

First, there is no question that plaintiffs have no other effective remedy if the action is dismissed for nonjoinder. As already noted, the Tribe is immune from suit in both State and Federal courts. In addition, the State is immune from suit in Federal court pursuant to the 11th Amendment of the U.S. Constitution (*see*, *Seminole Tribe v. Florida*, 517 US 44; *Ahern v. State of New York*, 244 AD2d 7, 9). Therefore, dismissal of the action based upon plaintiffs' inability to obtain jurisdiction over the Tribe would have the effect of absolutely barring resolution of the important and far-reaching issues raised in the complaints.

It is noteworthy, we believe, that a number of other jurisdictions have considered the question of whether a governor has the authority to bind a State to an Indian gaming compact, and in every State whose constitution does not grant residual powers to the executive, the litigation resulted in a declaration that the compact is void and unenforceable absent legislative concurrence (*see*, *Jicarilla Apache Tribe v. Kelly*, 129 F3d 535, 537; *Kickapoo Tribe of Indians v. Babbitt*, 827 F Supp 37, 46, *revd on other grounds* 43 F3d 1491; *McCartney v. Attorney General*, 231 Mich App 722, 727-728, 587 NW2d 824, 827, *lv denied* 460 Mich 873, 601 NW2d 101; *Narragansett Indian Tribe v. State*, 667 A2d 280, 282 [RI]; *State ex rel. Clark v. Johnson*, 120 NM 562, 574, 904 P2d 11, 23; *State ex rel. Stephan v. Finney*, 251 Kan. 559, 582-583, 836 P2d 1169, 1185). Further, the Court of Appeals has stated that the fundamental and critical policy decisions of this State are the exclusive prerogative of the Legislature (*see*, *e.g.*, *Bourquin v. Cuomo*, 85 NY2d 781, 784; *Matter of New York State Health Facilities Assn. v. Axelrod*, 77 NY2d 340, 349).

Appendix D

We are also mindful of defendants' arguments that (1) several bills have been introduced in the State Legislature that would have explicitly prevented the Governor from entering into gaming compacts negotiated pursuant to IGRA and that none have become law, and (2) chapter 264 of the Laws of 1993—authorizing the State Police access to criminal history records of persons applying to engage in activities authorized by IGRA—demonstrates that the Legislature has adopted the compact entered into by the Governor. Given the various arguments and in view of the considerable uncertainty concerning the Governor's authority to bind the State to tribal gaming compacts and the types of gaming that may be legally authorized in New York, the public interest would be best served by a determination of this litigation on the merits.

Nor are we persuaded that great prejudice would result from nonjoinder or that an effective judgment cannot be rendered in the Tribe's absence. Defendants' predictions of dire and irreparable economic injury to the Tribe in the event that judgment is granted in favor of plaintiffs fails to take account of the relief that is actually sought by plaintiffs or the fact that invalidation of the compact and the amendment would result not from the nonjoinder of the Tribe but from the Governor's lack of authority to bind the State—a possibility that was well known and considered at the time the Tribe entered into its agreements with the Governor. The complaint in action No. 1 merely seeks a declaration that the compact and the amendment are illegal and a nullity and permanently enjoining defendants from taking any *further* actions to implement them, i.e., operation of electronic gaming devices pursuant to the amendment or

expansion of the casino operations to the Monticello Raceway property. The complaint in action No. 2 seeks the same relief and, in addition, an injunction against the expenditure of further funds or other effectuation of the amendment or defendants "entering into" or amending any Tribal gaming compacts or the expenditure of funds in connection therewith without the prior full participation of the Legislature. Except for the electronic lottery terminals, which were authorized by the amendment only months prior to the commencement of these actions, the complaints do not seek to interfere with any of the Tribe's existing gaming facilities or activities. Unlike the cases cited by defendants as support for their contention that the Tribe is an indispensable party (*see, e.g., Manybeads v. United States*, 209 F3d 1164; *Fluent v. Salamanca Indian Lease Auth.*, 928 F2d 542, *cert denied* 502 US 818), the present actions do not involve a challenge to the power of an Indian nation. Quite the contrary, the central issue raised by the complaints in these cases is the authority of the Governor to enter into a Tribal State compact without legislative concurrence.

Further, in the event that the present actions were to result in a declaration of the invalidity of the compact and amendment and such declaration were to serve as a predicate for a future action threatening more concrete injury to the Tribe, perhaps a more compelling case for dismissal based on nonjoinder could be made in such action. The mere possibility of such further action provides an insufficient basis for dismissal in this action, however. For similar reasons, we also reject defendant's contention that no effective judgment can be rendered in the absence of the Tribe. Contrary to defendants' assertion, plaintiffs do not seek

to enjoin the Tribe from conducting gambling at its casino. With the exception of the Wright plaintiffs' attack on the amendment, all affirmative relief demanded by plaintiffs is prospective only.

We are also unpersuaded that the Tribe's interests are not being adequately represented by defendants. A person might not be an indispensable party if the absent person is united in interest with a party such that they " stand or fall together" (*Matter of Mount Pleasant Cottage School Union Free School Dist. v. Sobol*, 163 AD2d 715, 716, *affd* 78 NY2d 935; *see*, *Matter of Storrs v. Holcomb*, 245 AD2d 943, 945). Even accepting defendants' speculation that the damage suffered by the Tribe in the event of a judgment in favor of plaintiffs will be different in kind and extent than that suffered by defendants, the fact remains that the defense pursued by defendants is identical to the one that would be undertaken by the Tribe if it were a party to the action. Notably, the outcome of both actions turns on the resolution of pure legal issues involving the construction of State and Federal statutes and constitutions. No suggestion is made that the Tribe's lawyers would be likely to make a more persuasive argument on these issues than the ones that will be made by defendants if the actions are permitted to continue.

Based upon the foregoing, we conclude that the Tribe is not an indispensable party and that the actions may proceed in its absence. Rather than remit the matter to Supreme Court for consideration of the additional issues raised on the motions, we will endeavor to expedite a determination of the actions on the merits by resolving them ourselves.

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III.

A plaintiff has standing to maintain an action when that plaintiff has suffered an injury in fact and such injury falls within the zone of interests to be protected by the statute or constitutional provision involved (*see*, *Society of Plastics Indus. v. County of Suffolk*, 77 NY2d 761, 772-773). Here, plaintiffs argue that they have standing as voters and as citizen-taxpayers under State Finance Law § 123-b, organizational standing on behalf of members who either are opposed to gambling, favor constitutional action or, in the case of the Saratoga County Chamber of Commerce, would allegedly be hurt by the diversion of gamblers from Saratoga to the tribal casinos, and as individual members of the Legislature who were denied the right to vote on the approval of the compact. For the reasons that follow, it is our view that plaintiffs in both actions have standing.

First, we agree with plaintiffs that they have standing under State Finance Law § 123-b, which provides standing for citizen taxpayers in a suit concerning the wrongful misappropriation, expenditure or illegal disbursement of State funds (*see*, State Finance Law § 123-b[1]). " Since most activities can be viewed as having some relationship to expenditures * * * too broad a reading of section 123-b would create standing for any citizen who had the desire to challenge virtually all governmental acts" (*Rudder v. Pataki*, 93 NY2d 273, 281), and governmental acts which only incidentally involve State finances cannot be challenged based on State Finance Law § 123-b (*see*, *id.*, at 280-281; *Matter of Transactive Corp. v. New York State Dept. of Social Servs.*, 92 NY2d 579, 588-589; *Public Util. Law Project v. New York*

State Pub. Serv. Commn., 252 AD2d 55, 58-59; *Matter of Gerdts v. State of New York*, 210 AD2d 645, 647-648, *lv denied* 85 NY2d 810, *appeal dismissed* 85 NY2d 856). Here, however, we conclude that plaintiffs' challenge to the expenditure of moneys to implement a casino-gambling compact that was not approved by the Legislature, including the expenditure of funds to pay State Police personnel providing security and State Racing and Wagering Board employees regulating the casinos on a 24-hour basis, has "a sufficient nexus to fiscal activities of the State to allow for section 123-b standing" to the citizen-taxpayer plaintiffs in both actions (*Rudder v. Pataki*, *supra*, at 281; *see*, *Matter of Schulz v. Silver*, 212 AD2d 293, 296, *appeal dismissed* 86 NY2d 835, *lv dismissed and denied* 87 NY2d 916; *compare*, *Matter of Gerdts v. State of New York*, *supra*).

Next, we address defendants' argument that the plaintiff organizations lack standing. Organizational standing requirements are intended to "ensure that the requisite injury is established and that the organization is the proper party to seek redress for that injury" (*Society of Plastics Indus. v. County of Suffolk*, *supra*, at 775). An organization seeking standing must establish that (1) one or more of its members has been harmed, (2) the interests it asserts are germane to its purposes so as to demonstrate that it is an appropriate representative of those interests, and (3) the case would not require the participation of individual members (*see*, *Rudder v. Pataki*, *supra*, at 278).

New Yorkers for Constitutional Freedoms is a not-for-profit corporation representing approximately 1,650 churches and groups throughout the State whose individual members

are opposed to casino gambling and support the constitutional operation of government. The Coalition Against Casino Gambling is a not-for-profit association whose individual members reside primarily in the Catskills and are opposed to casino gambling in that region. Similarly, the Western New York Coalition Against Casino Gambling is an unincorporated association representing religious organizations and grassroots citizens who oppose casino gambling in this State. The interests asserted by the foregoing organizations are germane to their purposes and their individual members claim to have suffered directly from constitutional violations. Contrary to defendants' arguments that the organizations' allegations are nothing more than "generalized grievances unsuited to judicial review", it is our view that they have alleged cognizable harm to their members and that the requirements for standing have been met (*see*, *Subcontractors Trade Assn. v. Koch*, 62 NY2d 422, 426; *National Org. for Women v. State Div. of Human Rights*, 34 NY2d 416, 419-420; *cf.*, *Rudder v. Pataki*, *supra*, at 279).

We agree with defendants, however, that the Saratoga County Chamber of Commerce does not have standing. That organization asserts that it represents over 2,300 businesses and professional organizations whose economic livelihood depends on pari-mutuel bettors at the racetrack, which bettors may be lured away by the Tribe's existing casino and the casino planned for Monticello. In our view, the harm claimed is too speculative and attenuated to constitute an injury in fact (*see*, *Rudder v. Pataki*, *supra*, at 280). In any event, the constitutional provisions relied upon, relating to separation of powers and gambling, were certainly not intended for the protection of competing gambling facilities (*see*, *Matter of*

Troy Ambulance Serv. v. New York State Dept. of Health, 260 AD2d 715, 716; *Matter of LaSalle Ambulance v. New York State Dept. of Health*, 245 AD2d 724, *lv denied* 91 NY2d 810).

There is also no merit to the Saratoga plaintiffs' contention that they have voter standing because, as voters, they are entitled to the protection of the State's constitutional provisions regarding gambling, which can only be changed by a referendum approved by the State's voters. Voter standing arises when the right to vote is eliminated or votes are diluted (*see*, *Rudder v. Pataki*, *supra*, at 281; *see also*, *Schulz v. State of New York*, 84 NY2d 231, 240-241, *cert denied* 513 US 1127). In the present case, none of the constitutional or statutory provisions invoked by plaintiffs regarding separation of powers or gambling implicate the right to vote.

Finally, plaintiffs Frank Padavan and William Parment and the Wright plaintiffs seek standing as legislators but have not shown a particularized injury or established the absence of adequate political remedies. Indeed, their claim of standing is based on a loss of political power rather than the assertion that they have been deprived of something to which they personally are entitled (*cf.*, *Powell v. McCormack*, 395 US 486, 496). Unlike the cases relied upon by plaintiffs where standing was found because the defendants' actions affected legislators' statutory rights or duties (*see*, *Winner v. Cuomo*, 176 AD2d 60 [Members of the State Assembly claimed that Governor's failure to submit timely budget bills reduced their time to consider the bills]; *Matter of Sullivan v. Siebert*, 70 AD2d 975 [as a member of the Legislature, the plaintiff

was entitled to receive a copy of the defendant's report]), here, none of defendants' actions precluded the Legislature from acting and the claim that defendants acted improperly does not differentiate the legislative plaintiffs from the general public (*see*, *Raines v. Byrd*, 521 US 811; *Chenoweth v. Clinton*, 181 F3d 112, 115-116, *cert denied* 529 US 1012; *Matter of Posner v. Rockefeller*, 26 NY2d 970; *Silver v. Pataki*, 274 AD2d 57). While these plaintiffs do not have standing as legislators, they do have standing under the State Finance Law.

IV.

We also reject the contention that the actions are preempted by Federal law. Although it cannot be denied that IGRA is a Federal statute and that the regulation of Indian affairs is generally a Federal matter, we conclude that the narrow issues raised in these complaints are not preempted by Federal law. "IGRA says nothing specific about how we determine whether a state and tribe have entered into a valid compact. State law must determine whether a state has validly bound itself to a compact" (*Pueblo of Santa Ana v. Kelly*, 104 F3d 1546, 1557, *cert denied* 522 US 807 [citation omitted]; *see*, *Gaming Corp. v. Dorsey & Whitney*, 88 F3d 536, 544 [while IGRA generally preempts State law, the Tribal State compact provides the only avenue for significant State involvement]). Additionally, the Federal Department of the Interior opined that a governor's authority to enter into a Tribal-State compact is a matter of State law. Fundamentally, the interpretation given to a statute by the agency charged with enforcing it is entitled to great deference (*see*, *Chevron, U.S.A. v. Natural Resources Defense Council*,

467 US 837, 844; *Matter of Brown v. Wing*, 93 NY2d 517, 524; *Matter of Goff v. New York State Dept. of Social Servs.*, 222 AD2d 83, 87).

Nor are we persuaded that the actions are barred by the Statute of Limitations or laches. The four-month limitations period of CPLR 217, which is pressed by defendants, would apply only if the actions could have been brought as a CPLR article 78 proceeding (*see*, *New York City Health & Hosps. Corp. v. McBarnette*, 84 NY2d 194, 201-202). Here, the substance of the complaints is that the State's chief executive officer acted or threatens to act in violation of law or in excess of the powers conferred upon him by the State Constitution. In our view, neither of the actions could have been brought as a CPLR article 78 proceeding and the four-month Statute of Limitations of CPLR 217 accordingly does not apply (*see*, *Matter of Hamptons Hosp. & Med. Ctr. v. Moore*, 52 NY2d 88, 96; *Matter of McGinley v. Hynes*, 51 NY2d 116, 124, *cert denied* 450 US 918; *cf.*, *New York City Health & Hosps. Corp. v. McBarnette*, *supra*, at 204). As for laches, it should suffice to note that no party to the action has been prejudiced by plaintiffs' delay in bringing its challenge to the 1993 compact (*see*, *Matter of Schulz v. State of New York*, 81 NY2d 336, 348). Obviously, were the Tribe to voluntarily join as a party it could raise laches as a defense, with some likelihood of success (*see*, *Matter of Stockdale v. Hughes*, 189 AD2d 1065, 1067).

Finally, we agree with defendants that so much of the claims as seeks to restrain the development of a gambling casino at the Monticello site is not ripe for review. "Where the harm sought to be enjoined is contingent upon events

which may not come to pass, the claim to enjoin the purported hazard is nonjusticiable as wholly speculative and abstract" (*Matter of New York State Inspection, Sec. & Law Enforcement Empls. v. Cuomo*, 64 NY2d 233, 240 [citation omitted]; *see, New York Pub. Interest Research Group v. Carey*, 42 NY2d 527, 531). "However, where the practical likelihood is that the future contingency will occur, the action may proceed" (*Prodell v. State of New York*, 211 AD2d 966, 967-968 [citations omitted]). In this case, although the Secretary of the Interior has during the pendency of the action approved the land trust agreement, the Governor has neither taken action nor given any indication that he intends to take action on it.

To summarize, we have determined the following: (1) the Tribe is not an indispensable party and the actions may proceed in its absence; (2) plaintiffs have standing under State Finance Law § 123-b (1), three of the plaintiff organizations have standing and both actions may therefore proceed; plaintiffs have neither voter standing nor standing as legislators, however; (3) the narrow issues raised in these complaints are not preempted by Federal law; (4) the actions are not barred by either the Statute of Limitations or laches; (5) that part of the claims as seeks to restrain the development of a gambling casino at the Monticello site is not ripe for review.

In view of the foregoing, we conclude that Supreme Court should have denied all of the parties' motions except so much of defendants' motions as sought to dismiss the branch of the complaints addressed to the proposed Monticello casino and the part of defendants' motion

dismissing the complaint by Saratoga County Chamber of Commerce for lack of standing.

CARDONA, P. J., CREW III, SPAIN and LAHTINEN, JJ., concur.

Ordered that the judgment is reversed, on the law, without costs, defendants' motions to dismiss denied except to the extent that so much of the complaints as seeks to enjoin the establishment of a gambling casino in the Village of Monticello, Sullivan County, is dismissed as premature, and motions granted as to plaintiff Saratoga County Chamber of Commerce; and matter remitted to the Supreme Court for further proceedings not inconsistent with this court's decision.

APPENDIX E — DECISION AND ORDER OF THE NEW YORK SUPREME COURT, ALBANY COUNTY DATED MARCH 8, 2000

STATE OF NEW YORK
COUNTY OF ALBANY
SUPREME COURT

INDEX NO. 5507-99

ACTION NO. 1

THE SARATOGA COUNTY CHAMBER OF COMMERCE, INC., JOSEPH DALTON; NEW YORKERS FOR A CONSTITUTIONAL FREEDOMS, LTD.; LEE KARR, individually and as Chairman of THE COALITION AGAINST CASINO GAMBLING, an Unincorporated Association; G. STANFORD BRATTON, Individually and as Coalition Coordinator for the WESTERN NEW YORK COALITION AGAINST CASINO GAMBLING, an Unincorporated Association; the HONORABLE FRANK PADAVAN, Duly Elected and Serving Member of the New York State Senate; and the HON. WILLIAM PARMENT, a Duly Elected Member of the New York State Assembly,

Plaintiffs

-against-

HON. GEORGE PATAKI, Governor of the State of New York, JUDITH HARD, Deputy Counsel to the Governor, and the NEW YORK STATE RACING AND WAGERING BOARD,

Defendants.

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INDEX NO. 11971-99

ACTION NO. 2

KEITH L. WRIGHT, as Member of the New York State Assembly, and LARRY B. SEABROOK, as member of the New York State Senate,

Plaintiffs,

-against-

GEORGE E. PATAKI, as Governor of the State of New York, and THE STATE OF NEW YORK,

Defendants.

Supreme Court All Purpose Term, February 1, 2000
Assigned to Justice Joseph C. Teresi

* * *

DECISION AND ORDER
RJI NO. 0199059775

TERESI, J.:

Defendants move separately to dismiss both above-captioned actions, number one and two. Third-party plaintiff, Village of Monticello, cross-moves for an order pursuant to CPLR 3212 granting summary judgment on its' claim for an Order declaring the 1993 Compact and May 27,

1997 Amendment valid and enforceable. Plaintiff opposes defendant's motions and third-party defendants oppose the cross-motion.

In October 1993, then-New York Governor Mario Cuomo signed a compact with the St. Regis Mohawk Indian Tribe, which was subsequently approved by the United States Secretary of the Interior, entitled the "Tribal Compact between the St. Regis Mohawk Tribe and the State of New York." The Compact authorizes the St. Regis Mohawk Indian Tribe to conduct certain commercial Class III gaming operations within the Mohawk Tribe's reservation, located on the their Akwesasne reservation in northern New York.

The Compact was entered into pursuant to the provisions of the federal Indian Gaming Regulatory Act (IGRA). The IGRA provides a regulatory framework for gaming activities on Indian lands. The IGRA provides that Class III gaming, which concerns the St. Regis Mohawk Tribe's conduct in this lawsuit, is only lawful when it is: (1) authorized by an ordinance or resolution adopted by the governing body of the Indian tribe and approved by the Chairman of the National Indian Gaming Commission; (2) located in State that permits such gaming for any purpose by any person, organization, or entity; and (3) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State that is in effect. 25 U.S.C. § 2710(d)(1).

Pursuant to the 1993 Compact, the St. Regis Mohawk Indian Tribe opened a casino on their reservation in Franklin County in April 1999. On May 27, 1999, Governor Pataki,

through his Deputy Counsel Judith Hard, entered into an Amendment to the 1993 Compact allowing electronic gaming devices at the Casino.

Furthermore, in August 1996, the St. Regis Mohawk Indian Tribe pursuant to federal law, submitted an application to the US Department of Interior requesting that the Secretary of Interior acquire land into trust in and around Monticello Raceway in Sullivan County so that the Mohawk Tribe could operate a gambling casino. To date, the application is still under consideration by the Secretary of the Interior. If approved by the Secretary, the application will then require the concurrence of the Governor.

In short, plaintiffs argue that neither Governor Cuomo or Governor Pataki had the authority to enter into the Compact and Amendment without the express authorization of the State Legislature. Therefore, the 1993 Compact and Amendment must be ruled invalid and unenforceable. Additionally, plaintiffs aver that the types of gaming involved in the Compact and Amendment is prohibited by the New York State Constitution. Initially, defendants answer by asserting that the lawsuit should be dismissed based on a number of procedural deficiencies which include, *inter alia*, failure to name an indispensable parry.

A court may always consider whether there has been a failure to join a necessary party. *See City of New York v. Long-Island Airports Limousine Service Corp.*, 48 NY2d 469, 475 (1980). Necessary parties are defined as "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who

might be inequitably affected by a judgment in the action." (CPLR § 1001(a)). An action is subject to dismissal if there has been a failure to join a necessary party. (*See* § CPLR 1003(b)). The rule insures fairness to third parties who ought not to be prejudiced or embarrassed by judgment purporting to bind their rights or interest where they have had no opportunity to be heard. *See City of New York, supra.*

Furthermore, a determination as to whether parties are so "indispensable" that in their absence a matter should not proceed is limited to those cases where the determination will adversely affect the rights of non-parties. *Matter of Vicki Llana v. Town of Pittstown,* 245 AD2d 968 (3rd Dept. 1997); *Matter of Castaway Motel v. Schuyler,* 24 NY2d 120, 125 (1969).

Based upon a full review of the record, this court holds the St. Regis Mohawk Indian Tribe to be an indispensable party to these actions. Therefore, the court grants defendant's motion to dismiss the complaint. Consequently, the Court finds no reason to address plaintiff's remaining contentions, nor address third party plaintiff's motion for summary judgment.

Initially, this court recognizes New York courts have held that an Indian tribe may be found an indispensable party to a lawsuit. *See Niagra Mohawk Power Corp. v. Anderson,* 258 AD2d 958 (4th Dept. 1999); *Anderson v. Town of Lewiston,* 244 AD2d 965 (4th Dept. 1997). Furthermore, there can be little doubt here, that a ruling invalidating the 1993 Compact and Amendment would adversely affect the St. Regis Mohawk Indian Tribe. *See Llana., supra* at 969.

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In holding the Mohawk Tribe to be indispensable party to this lawsuit, the court finds the criteria in CPLR § 1001(b)(2) to be the most compelling factor in weighing the merits of this issue. CPLR § 1001(b)(2) states a "court shall consider the prejudice which may accrue from the non-joinder to the defendant or to the person not joined." By carefully balancing the potential prejudices that would accrue, respectively, to the St. Regis Mohawk Indian Tribe and plaintiffs, this court finds that the potential prejudice to the Mohawk Tribe outweighs the prejudice to plaintiffs. Furthermore, any litigation commenced in the Mohawk Tribe's absence might "inequitably affect" their interests. (*See Niagra Mohawk Com. v. Anderson,* 258 AD2d 958, 959 (4th Dept. 1999); *See Anderson v. Town of Lewiston,* 244 AD2d 965, 966 (4th Dept. 1997).

The 1993 Compact and Amendment creates the authority by which the St. Regis Mohawk Indian Tribe can conduct Class III gaming operations on its reservation. This type of gaming is considered the most lucrative form of gambling, and therefore, is an important source of revenue for the Mohawk Tribe. An invalidation of the Compact would strip the Mohawk Tribe of this valuable right granted to them by the Compact in allowing the them to conduct certain gaming operations on their reservation. Consequently, without an agreement, the Mohawk Tribe stands to lose millions in revenue.

Moreover, should the St. Regis Mohawk Indian Tribe continue to conduct class III gaming operations without a valid compact, they could face serious federal penalties by violating the IGRA, subjecting them to civil or criminal

consequences in federal court. (*See United States v. Santee Sioux Tribe of Nebraska,* 135 F.3d 558 (8th Cir. 1997); *See Pueblo of Santa Ana v. Kelly,* 932 F. Supp. 1284 (D.N.M. 1996), *aff d.* 104 F.3d 1546 (10th Cir. 1997).

In conclusion, this court agrees with defendants that the failure to join the St. Regis Mohawk Indian Tribe, an indispensable party, requires the dismissal of the above-captioned actions, number one and two. "Because resolution of these controversies involve a determination of the rights and powers of the Indian Nation to [allow certain commercial gaming operations] on its reservation, complete relief cannot be accorded without the Indian Nation as a party. Furthermore, because a judgment in plaintiffs favor would challenge the [rights] of the Indian Nation, the Indian Nation might be 'inequitably affected' by this litigation.'" *See Niagra Mohawk Power Corp. v. Anderson,* 258 AD2d 958, 959 (4th Dept. 1999); *Anderson v. Town of Lewiston,* 244 AD2d 965, 966 (4th Dept. 1997).

All papers, including this Decision and Order, are being returned to the attorneys for the defendant. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

SO ORDERED!

Dated: Albany, New York
March 8, 2000

s/ Joseph C. Teresi
JOSEPH C. TERESI, J.S.C.

APPENDIX F — LETTER FROM THE SUPREME COURT OF THE UNITED STATES, OFFICE OF THE CLERK, WASHINGTON DC TO ANDREW D. BING DATED JULY 29, 2003

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

July 29, 2003

Mr. Andrew D. Bing
Assistant Solicitor General
Office of the Attorney General
The Capitol
Albany, NY 12224

Re: George Pataki, Governor of New York, et al.
v. Saratoga County Chamber of Commerce, Inc., et al.
Application No. 03A75

Dear Mr. Bing:

The above-entitled application was presented to Justice Ginsburg, who on July 29, 2003, noted thereon the following:

> "The Appellate Division, whose order the Court of Appeals affirmed in relevant part, noted that 'plaintiffs do not seek to shut down the Tribe's casino located on the Akwesane reservation

> insofar as it is operated in accordance with the original compact.' 293 A. D. 2d 20, 22 (N.Y. App. Div. 2002). The application for a stay is denied on the understanding that 'operat[ing] in accordance with the original compact' includes continued gaming oversight by the New York State Racing and Wagering Board and continued law enforcement by the New York State Police."

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

by s/ Troy D. Cahill

Troy D. Cahill
Staff Attorney